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No. 2150

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC COAL AND TRANSPORTATION COMPANY (a corporation) and M. D. McCUMBER,

Appellants,

vs.

PIONEER MINING COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

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Statement of the Case.

This is a suit to quiet title brought by the Pioneer Mining Company, a corporation, appellee, against The Pacific Coal and Transportation Company, a corporation, and M. D. McCumber, appellants, the real property involved in the controversy being a certain mining claim located in the Nome Mining District, Alaska, and known generally as "Bench No. 1 on Moonlight".

The action was tried before the Judge of the District Court of Alaska sitting without a jury and judgment was rendered upon findings of fact and conclusions of law in favor of appellee and against appellants. Appellants made a motion for a new trial in the Court below, which motion was denied, and appeal is now taken from the order denying said motion and also from the final judgment in the case, and the appeal is based upon three bills of exceptions setting forth in narrative form, all of the evidence taken at the trial including the oral testimony of witnesses, and also a large number of exhibits, consisting of maps, location notices, leases, and other documents of that character.

There is found in the Transcript an assignment of errors containing 79 specifications wherein it is alleged that the judge of the lower Court committed error in the trial of the action. The purpose of this appeal is to secure a reversal of the judgment wherein appellants were deprived of their property, and either to have judgment directed in favor of appellants and against appellee upon the testimony adduced, or to have the judgment of the lower Court set aside and a new trial granted.

The Facts.

On the 3rd day of January, 1899, one W. N. Grant located a claim consisting of twenty (20) acres of placer mining ground near the mountain

known as Anvil, and described generally as commencing at the eastern end of a certain claim belonging to one Robert Lyng, and extending in an easterly direction 1320 feet and 330 feet on each side of the center east side stake of the said claim of Robert Lyng (Trans. p. 228).

All of the acts necessary to make a valid location were performed by the said W. N. Grant, and his location notice was filed for record on January 17, 1899, and is found in vol. 3, page 59, of the Records of the Cape Nome Mining District. After the location of the claim by Grant, and on the 4th day of October, 1901, the Pacific Coal and Transportation Company filed an amended location notice upon the same ground, which amended location was filed for record October 7, 1901, in Vol. 95 of the Records of the Cape Nome Mining District, at page 225.

On the 31st day of March, 1900, the said W. N. Grant conveyed a one-half interest in his claim by deed to the Corwin Trading Company, a corporation, and on the 8th day of August, 1901, the said corporation conveyed the same interest to the appellant, Pacific Coal and Transportation Company.

On the 4th day of October, 1901, the said appellant filed its amended location upon the claim. Thereafter, the said corporation advertised out its co-owners, W. N. Grant and his associates, for failure to do or pay for their assessment work for the years of 1900 and 1901 (Trans. pp. 617, 618). On the 15th day of August, 1908, the said corporation leased the claim to M. D. McCumber, the other ap-

pellant in the case, and the period of the lease was continued in writing by the lessor until the time of the trial in the Court below. Assessment work was done on the claim by the appellants and their predecessors in interest, for each year beginning with 1899 and ending with the year 1910, and proofs of labor for nearly every year were filed. There does not seem to be much controversy upon this point.

From the time the claim was located and up to the very time of the trial the appellants and their predecessors in interest, were in physical possession of the claim and did a vast amount of mining work thereon. We shall later in the brief call attention to the evidence in detail upon this point.

The controversy between appellants and appellee arises from an alleged conflict on a portion of the claim of appellants. It is contended by appellee that the western portion of the claim of appellants is really a part of another claim called the Moonlight Bench Claim No. 1, which was located by Mr. Andrew Jensen on January 3, 1899. This Moonlight Bench Claim No. 1 overlaps both the claim of Robert Lyng known as Moonlight Claim, and also the Grant Claim of appellants. Appellee acquired the said Jensen Claim by mesne conveyances.

Appellants were in actual physical possession of their Grant Claim including the conflict portion thereof, at the time of the trial and their possession and that of their predecessors in interest, had

been open, notorious, adverse, continuous, and against all the world except the Government of the United States, from the time of the location until the very moment of the trial of the action. They and their predecessors in interest did a vast amount of work and expended quite a sum of money *upon the conflict portion of the claim.* Their possession for over ten years was undisturbed. Their work upon the claim was not interfered with. Through the frozen muck they drove their shafts and tunnels with the perseverance and industry which only a miner, beckoned on by hope, can exhibit. When they had reached the pay streak, appellee came down upon them, set up a conflict, and sought to reap the reward of their industry. Can this be successfully done under the letter and spirit of the law?

The Law.

I.

THE MOTION OF DEFENDANTS (APPELLANTS) FOR A JURY TRIAL OF THE ACTION SHOULD HAVE BEEN GRANTED, BUT IN ANY EVENT DEFENDANTS' MOTION TO SUBMIT SPECIAL ISSUES OF FACT TO A JURY SHOULD HAVE BEEN ALLOWED.

Both of these propositions are presented in the Bill of Exceptions No. 1, found on pages 110 and 120 of the transcript, and also in Assignment of Errors No. 1. The facts are as follows:

Plaintiff in the Court below brought his action under Section 475 of the Code of Civil Procedure

of Alaska (Carter's Codes, p. 246), and alleged that he was in possession of the claim in controversy. The complaint was verified and defendants filed verified answers in which they both denied specifically the allegations of plaintiff's complaint. The defendant, McCumber, further pleaded his written lease from his co-defendant, the Pacific Coal and Transportation Company, and set forth in detail his possession, and denied the possession of plaintiff. But furthermore the said defendant served and filed an affidavit together with his motion for a jury trial, in which he alleged that he "is in pos- " session of the ground in controversy and is en- " gaged in mining thereon" (Trans. p. 113).

No counter showing whatever was made by plaintiff except such as is contained in his general formal allegation of possession found in Paragraph IV of his complaint (Trans. p. 2). Three questions seem to claim our attention, (a) Is the defendant bound by the allegations of the complaint so that he cannot by motion or otherwise controvert said allegations before the actual trial of the case? (b) Can a plaintiff out of possession in fact drive a defendant in possession into a Court of equity and deprive him of his constitutional right to a trial by jury? (c) Is a suit to quiet title a substitute for an action in ejectment?

It seems obvious to us that if a mere allegation of fact in a complaint were to be deemed to be conclusive on the question of possession, then never could a defendant in possession avail himself of the

right to a jury trial in an action involving title to real property if the plaintiff were willing to allege his possession in the complaint. Since possession is the very fact at issue, it would be absurd to say that a defendant must first try out that fact to determine whether he can have a jury trial, because then a jury becomes indeed superfluous, after the Court has heard and decided the very question at issue. But when a defendant on oath denies the possession of plaintiff and asserts possession in himself and makes up a preliminary issue by motion, the Court must consider the matter as other preliminary issues are disposed of. Otherwise no defendant can ever secure his right to a trial by jury of the question of the ownership of his land, provided a plaintiff is willing to allege in his pleading that he is in possession of the land of the defendant. Not only do we thus have a suit to quiet title substituted for an action in ejectment, which in its primary essence was a suit to determine the right of possession, but the action of ejectment with its right to trial by jury will on this hypothesis cease to be used in litigation. This analysis compels us to make an investigation into the nature and scope of what is known as a suit to quiet title. And in our investigation we shall consider the opinion of the learned Court below rendered in deciding the motion under consideration and found on pages 8 to 18 of the transcript. It is obvious that the learned Court decided the motion entirely on the pleadings

and therefore on the allegations of fact, contained in the complaint, solely.

The Alaska statute, Section 475, C. C. P., reads as follows:

> "Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest."

It is conceded that the action at bar is brought under this section. Obviously it can be no answer to our argument to say that the Court after a trial of the issues, found as a fact that the plaintiff was in possession at the time the action was brought, because then we shall be conceding that only a trial of the Court can determine the very question which defendants wish tried by a jury. On a motion, however, if the Court found prima facie that the defendants were in possession and plaintiff out of possession, the final determination of the question could be well left to a jury and all the rights of the defendants preserved.

The California statute comparable with the Alaska statute is Section 738 of the Code of Civil Procedure and reads in part as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim;

> "* * * and provided, however, that nothing herein contained shall be construed to deprive a party *of the right to a jury trial* in any case, where by the law, such right is now given" (italics not ours).

It is very interesting to compare the California statute with the Alaska statute, and then to examine the cases which have been decided under the California statute. We assume that the condition in the Alaska statute to the effect, that the person, who brings the action under said statute, must be in possession of the property, in view of the fact that there is no such provision in the California statute, should be of some significance.

The leading case decided in the State of California and a case which we insist has been followed very generally, is the case of

Donahue v. Meister, 88 Cal. 122.

The facts show that the action was a suit involving a mining claim and was brought under Section 738 of the Code of Civil Procedure. The complaint in the usual form avers that the plaintiff was in possession. In the answer the possession of the plaintiff is admitted and possession is also alleged in the defendant, prior to a certain date when it is alleged the plaintiff wrongfully and unlawfully entered and ousted defendant therefrom. At the proper time the defendant demanded a jury on the issue raised by said averment of prior pos-

session and ouster, which demand was opposed by plaintiff on the ground that the case was a proceeding in equity, and on that ground, the Court refused a jury.

In reversing the case and holding with appellant on the point that the Court erred in denying his demand for a jury, the learned judge says as follows:

> "It is quite clear that the Legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that provision of the State Constitution which says that 'the right to trial by jury shall be secured to all, and remain inviolate.' And Section 738 of the Code must not be construed as intending to violate that provision of the constitution, unless such construction be unavoidable. Issues about titles to land, such as those presented by the answer in the case at bar, were triable at law at the time the Constitution was adopted, and therefore either party has the right to have such issues tried by a jury. (Taber v. Cook, 15 Mich. 322). And Section 738 need not be construed as attempting to take away that right. The main effect of said section is to give parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not before exist; but if in such a suit issues arise which are clearly legal and cognizable in a court of law, the code does not take away the right to have such issues tried by a jury. Formerly an action like the one at bar could not have been maintained at all; plaintiff would have been compelled to wait until the defendant chose to disturb his possession by an ac-

tion. The Code enabled one in his position to commence the legal contest; but when he thus brings a defendant into court he must be prepared to meet any pertinent issues which the latter may tender, and to try them in the way in which the defendant has the right under the constitution to have them tried. * * *

"But it is clear that the right to a jury trial cannot be avoided by merely calling an action equitable. If that were so, the legislature by providing new remedies and new kinds of judgments and decrees in form equitable, could in all cases dispense with juries, and thus entirely defeat the constitutional provision on the subject. * * *

"In the case at bar, according to the verified answer, defendant was entitled to possession, and was in the possession of the disputed premises a short time before the commencement of the action, and was ousted by plaintiff. If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit, and thus inverting the parties, could not deprive defendant of his right to a jury. If it were not for the provision of the code, plaintiff would have been compelled to wait until defendant commenced his action, and then there would have been no question about the right to a jury; but while the Legislature had the power to grant the plaintiff the privilege of himself commencing the suit, it had not the power to give him, and we think did not intend to give him the privilege of thus depriving defendant of his constitutional right. * * *

"It is decided here only that where the answer shows that the defendant was rightfully

> in possession, and was ousted by plaintiff and wrongfully kept out of possession, upon the trial of those issues, the defendant is entitled to a jury trial."

The learned Court who tried the case below is entirely mistaken in supposing that the above case has ever been overruled or in any way modified by the Supreme Court of the State of California, but upon the other hand, it has been repeatedly affirmed in principle.

We cite next the case of

Newman v. Duane, 89 Cal. 598.

In this case very significant language is used by the Court as follows:

> "The plaintiff in his complaint merely alleges that he is the owner in fee 'and in possession' of certain described lands; and that defendant without any right whatever, claims an interest or estate in said land adverse to plaintiff. The complaint, as to the real issues between the parties, is quite childlike and bland and does not contain any intimation that defendant was in the actual possession of the land, and that what plaintiff mainly wanted was to put defendant out. The prayer does not suggest that plaintiff would like to have a writ of restitution. But the answer denies all the allegations of the complaint, and sets up that defendant has been in possession of the land for more than fifteen years; and the Court finds that he has been thus in possession for at least four years before the commencement of the action. Judgment was rendered for plaintiff, which among other things, decrees that 'plaintiff do have a writ of possession of said

premises as against the defendant and all persons claiming under him'. From the judgment, and from an order denying a new trial, defendant appeals.

"Before the commencement of the trial, defendant duly demanded a trial by jury; 'but the Court refused to grant him the same, on the ground that the case was an equity case, in which he, said defendant, was not entitled to a jury trial as a matter of right'. Defendant duly excepted; and the first point made by appellant is, that the Court erred in refusing his demand for a jury.

"We think that the appellant was clearly entitled to a jury, not only upon the principles discussed and determined in Donahue v. Meister, 88 Cal. 121, but in accordance with the specific language of Section 592 of the Code of Civil Procedure, which expressly gives the right to a jury trial 'in actions for the recovery of specific real or personal property'. In the case at bar, where the defendant was in possession, claiming adversely to plaintiff, the obviously proper action to have been brought was what we call an action of ejectment,—that is, an action 'for the recovery of specific real property',—in which case the defendant would have been clearly entitled to a jury. Plaintiff has endeavored to accomplish the same result—that is, the restitution of possession in the form of a statutory action under Section 738 of the Code of Civil Procedure. Assuming that said section contemplates a case where the plaintiff is out of possession, and the defendant in possession, still it is evident that the plaintiff herein, by simply framing his complaint in a particular way, could not deprive the defendant of a jury trial of the issues raised by his answer."

The case is again followed by the decision in

Gillespie v. Gouly, 120 Cal. 515.

We quote from the opinion as follows:

> "This action may be said to be one of those statutory actions authorized by Section 738 of the Code of Civil Procedure. It is an action brought to quiet title by a party out of possession against one claiming title and in possession. In such an action either party is entitled to a jury as a matter of right. (Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; Newman v. Duane, 89 Cal. 597; Hughes v. Dunlap, 91 Cal. 385; Taylor v. Ford, 92 Cal. 419; Landregan v. Peppin, 94 Cal. 465.)

We cite also the case of

McNeil v. Morgan, 157 Cal. 373,

where there is another express affirmance of the Donahue v. Meister case, and we quote from the case as follows:

> "For example, it has been held that such a party is bound by depositions taken prior to his intervention (Rainbolt v. March, 52 Tex. 246) but the right of trial by jury being a very important privilege preserved by our constitution we would be loath to extend the rule in such manner as to deprive an intervenor of a trial upon matters of fact by a jury where he would enjoy the right to such manner of trial in an action commenced by him originally."

The facts in this case show clearly that the defendant in his pleading admitted the possession of plaintiff and did not allege possession in himself.

The case of

Davis v. Judson, 159 Cal. 123,

also contains an implied affirmance of the doctrine of Donahue v. Meister, and in the case we find this very significant language:

> "Whether an action involves legal issues, or issues of equitable cognizance, must depend upon the facts alleged in the particular case and when the facts alleged here and the issues raised are considered, it is apparent that they are strictly of an equitable nature. None of the parties to the action alleged any actual possession of the lots in question or seek to be awarded possession."

Berleigh v. Hecht et al., 117 N. W. 367 (South Dakota 1908).

> Syllabus: Notwithstanding that Rev. Code Civ. Proc., Section 675, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, embraces both the former action of ejectment and the action to quiet title, an action thereunder cannot be said to be a legal or equitable action independently of the pleadings and when plaintiff claims to own the property, and defendant is in possession, and plaintiffs seek to recover said possession as well as to determine defendants' adverse claims, the action is a legal one, and the parties are entitled to a jury trial under Section 244, providing that an issue of fact for the recovery of specific real property must be tried by a jury, unless a jury trial be waived as provided in Section 275.

Seliner v. McKay, 2 Alaska 564.

SYLLABUS: In an action to quiet title, the defendant answered that plaintiff shortly before the commencement of the action ousted him from the rightful possession of the land in controversy, and wrongfully kept him out of the possession thereof. These allegations were put in issue by the reply. The defendant moved to have those issues tried by a jury. Held, on authority of Donahue v. Meister (Cal.) 25 Pac. 1096, that the issues of title, ouster, and damages thus raised by the pleadings should be referred to a jury for trial, under Section 371, Code of Civil Procedure of Alaska relating to trials of issues by jury in actions of an equitable nature.

Gage v. Ewing, 107 Ill. 11.

SYLLABUS: Laws 1871, Section 50, providing that Courts of Chancery 'may hear and determine bills to quiet title and to remove clouds from title of real estate', do not interfere with the constitutional right of trial by jury, as the Court has power to submit issues of fact to a jury.

Carlson et al. v. Sullivan, et al., 146 Federal Reporter 476.

We quote from the opinion at page 479 as follows:

"We are of the opinion that, under the provisions of the Seventh Amendment of the Constitution of the United States, a party in possession of real estate, claiming the whole title is entitled to a right of trial by jury, and that

this rule is settled by the decisions of the Supreme Court.

Whitehead v. Shattuck, 138 U. S. 146, 151; 11 Sup. Ct. 276; 34 L. Ed. 873;

Scott v. Neely, 140 U. S. 106, 109; 11 Sup. Ct. 712, 35 L. Ed. 358;

Lacassagne v. Chapuis, 144 U. S. 119; 12 Sup. Ct. 659, 36 L. Ed. 368.

It is contended by appellants, however, that the right of trial by jury is not a fundamental right and that the Seventh Amendment to the Constitution has no application to territorial legislation, nor to the jurisdiction of the Courts thereunder, and that the Federal Courts will not decline equity jurisdiction simply because legal questions are involved when the action is brought under a state or territorial statute, and not under the general equity powers of the Court; and numerous authorities are in support of these propositions.

That the constitution of the U. S. applies to Alaska is settled by the reasoning of the decision of the Court in Rasmussen v. U. S., 197 U. S. 516, 525; 25 Sup. Ct. 514, 49 L. Ed. 862 et seq. In that case the Court refers to Black v. Jackson, 177 U. S. 349, 363, 20 Sup. Ct. 648, 44 L. Ed. 801, where the Court, in speaking of law of the territory of Oklahoma and of the contention of appellant, said: * * *"

It was contended by the Judge of the lower Court that Forderer v. Schmidt et al., 146 Federal Reporter 480, in some way changes the doctrine of the above cited case but we are of the opinion that this case simply accentuates the principle for which we are contending. The facts show that the action was brought by the plaintiff against the defendant for

the partition of a certain mining claim in Alaska. The defendant admitted ownership of a half interest of the claim in the plaintiff, but alleged that the defendant had forfeited the plaintiff out by proceedings provided under the law. The answer also prayed that if the plaintiff should be held to be the owner, the defendant was entitled to have charged against the claim as a lien upon any interest which may be adjudged to be the plaintiff's, certain expenditures made by defendant in working the property and making improvements thereon.

Under this state of facts, the syllabus clearly and correctly states the law as follows:

> Where plaintiff brought suit for partition of a mining claim alleging ownership in common with defendants of the property in controversy, and defendant's answer expressly conceded plaintiff's original ownership of an undivided one-half of the claim and only sought to defeat that ownership by alleging forfeiture by plaintiff's failure to contribute to the performance of assessment work, the action was properly triable in equity under Civ. Code Proc. Alaska C. 43, 397, 398, 403, providing for the partition of lands, and it was therefore error for the Court to dismiss the cause and remit plaintiff to his action in ejectment.
>
> Gilberson v. Cook et al., 124 Fed. Reporter 986.

The facts in this case show that the issue involved title to a mining claim. The action was one brought in equity by plaintiff against defendant, and the question sharply presented is as to whether

a Court of equity has jurisdiction, in view of the condition of the pleadings.

We quote from the opinion in the case:

> "The bill alleges that the plaintiff is in actual possession of the property; the answer denies it. Can a Court of Chancery under Federal procedure, take jurisdiction of such a case? The answer must be in the negative. The reason is plain. Section 723 of the revised Statutes of the U. S. (U. S. Comp. St. 1901, p. 583) provides:
>
> "Suits in equity shall not be sustained in either of the Courts of the U. S. in any case where a plain, adequate and complete remedy may be had at law'. If the complainant is out of possession, and the defendants are in possession, ejectment will lie, which is a complete remedy; and if neither party is in possession, a bill in equity will not lie, under the English Chancery practice to quiet the title."

Davidson et al. v. Calkins et al., 92 Federal Reporter 230.

SYLLABUS: A Federal Court is without jurisdiction of a suit in equity to determine or quiet the title to real estate of which defendant is in possession though such a suit is authorized by the statute of the State, as the effect would be to draw into a Court of equity a controversy properly cognizable at law.

Cosmos Exploration Co. et al. v. Gray Eagle Oil Company et al., 112 Fed. Reporter 4.

SYLLABUS:. A Federal Court of equity is without jurisdiction of a suit to determine the title or right of possession to lands brought by one who is out of possession against a claimant

> in possession and averments in a bill that defendant has drilled oil wells on the land, and is taking oil therefrom, against which an injunction is prayed, are in effect, averments that defendant is in possession, and render the bill subject to demurrer as in purpose and effect, an ejectment bill.

Johnston v. Corson Gold Mining Company et al., 157 Fed. Rep. 145.

This case comes from Alaska and involves the right of one holding a lease the term of which, was to begin in futuro, to bring an equitable action and to give the Court equitable jurisdiction, by simply praying for an injunction to prevent waste and an accounting and the cancellation of instruments alleged to constitute a cloud upon the title.

It was held

> "that inasmuch as plaintiff has a complete remedy at law, his position invoking the general equity powers of the Court cannot be upheld" (page 154 of the opinion).

The reason for this rule is that

> "where there is a legal title, and one who holds it is kept out of possession by defendants holding adversely, the remedy is at law to recover possession" (page 149 of opinion).

We have examined the Oregon cases cited by the learned Court below upon pages 14 and 15 in the Transcript, and we call particular attention to the fact that the right to a jury trial does not seem to have been involved in any of the cases.

In the cases cited by us from California the right to a jury trial upon motion made in a preliminary way, was directly involved.

We have cited from many cases to show how zealous the Courts are, in preserving the distinction between legal and equitable actions involving the right to possession to and title of real property. How much the more zealous should the Courts be when the motion for a jury trial was made in due time, and where the motion was denied even though it was practically conceded that defendants were in possession of the property, and therefore the right to possession was the paramount question in the case?

We also call special attention to the fact that most of the cases cited by us are mining cases involving claims where the possessory right is the paramount question, because mining claims as a species of real property are soon exhausted of their values, and therefore possession is usually tantamount to ownership.

We are constrained to say that the case of Maddern v. McKenzie, 144 Fed. Reporter 64 (Alaska 1906) holds only in effect that a motion should be made to transfer the case to the law side of the Court. The decision in that case was based upon a proposed change in a lease by an oral agreement and the right to a trial by jury was not directly involved.

We submit that the best test which could be applied in the solution of any contested question of this character would be an answer to the question, Is either the plaintiff or the defendant entitled prima facie to a jury trial upon the questions at issue?

We have reserved the case of Angus v. Craven, 132 Cal. 691, for consideration as the last case amongst the California cases, because the learned Court below seemed to be of the opinion that

> "in the case of Angus v. Craven, 64 Pacific Reporter 1091, the Supreme Court of California arrives at a different conclusion from that of Donahue v. Meister, supra, and in effect overrules it" (Trans. p. 17).

Upon the other hand we assert very confidently that this case affirms the doctrine and reasoning of Donahue v. Meister and illustrates clearly the distinction between a case like Angus v. Craven and a case like the case at bar.

In Angus v. Craven the action was brought under Section 738 of the Code of Civil Procedure of the State of California and possession was alleged in the plaintiff. *The answer admitted plaintiff's possession and did not show any prior possession in defendant,* which facts are clearly called attention to in the opinion itself.

We quote from page 697 of the opinion upon this point:

> "A complaint showing that plaintiff is the owner of the land, and in actual possession of it,

> and that defendant asserts some right or title thereto which is unfounded, followed by an answer admitting plaintiff's possession, and *not showing prior possession in defendant* seems to present the very action contemplated by the code provision; and under these conditions, its continued equitable character is not affected by the particular kind of right which the defendant sets up. Therefore, if we are to consider the case at bar solely in the light of an action to quiet title under Section 738, we do not think that, under the conditions above stated, the Court below erred in denying appellant's demand for a jury."

It is further pointed out that the action brought in this case was one to have a certain deed, which was asserted by defendant to be a valid conveyance of the property involved in the action, set aside as is shown by the following language:

> "Now in the case at bar the facts averred in respondent's pleadings entitled them to relief under Section 3412 and to have the alleged forged deeds to be declared to be such, and be cancelled."

It therefore appears from this case clearly that the question of the possession of the defendant is an exceedingly important one, and if defendant had alleged possession of the property and had demanded a jury trial, we may well believe that the denial of such a demand would have been considered serious error, and to sustain our position in this regard, we quote the following language from the decision in the case:

> "Courts, however, in guarding the constitutional right to a jury trial, have repeatedly held

that where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated, where, at the commencement of the action, the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff by first bringing his action to quiet title, could not by such inversion of parties, avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession. But this is as far as this Court has gone in Donahue v. Meister, 88 Cal. 121; Newman v. Duane, 89 Cal. 597; Gillespie v. Gouly, 120 Cal. 515; Moore v. Copp, 119 Cal. 434, and kindred cases. As was substantially said in Donahue v. Meister, supra, the decision of the question whether, in an action brought under Section 738, either party is entitled to a jury must depend greatly upon the facts in that particular case. It has never been held by this Court that an action to quiet title under the code cannot be maintained as an equitable action, where the plaintiff was, and for a considerable period of time had been, in actual possession, and defendant had never been in possession, or that in such case a defendant can overthrow the equitable character of the action by simply answering that he has title, and praying that he for the first time be let into possession."

But even if we assume that we are mistaken on this branch of the argument and that defendants were not entitled by the facts presented on their motion to a jury trial as of right, still we think then we have at least demonstrated that upon the showing made, the defendants should have been permitted to submit certain issues of fact to a jury.

It is rather a serious matter in any event as we have shown from the opinions of many learned judges, to deprive a party of a trial by jury upon such an important question as the ultimate right to the possession and ownership of a mining claim. But if we are to concede that the right to a jury trial may be taken away, even in an action which in its essence is brought for the purpose of determining the right of possession to a mining claim, still where there is any doubt upon the law of the question, it would seem that the chancellor ought to resolve that doubt in favor of the constitutional right to a trial by jury, at least to the extent of submitting special issues of fact to a jury when solicited by the defendants so to do. We must remember that the right to a mining claim is in its essence a possessory right, especially where no patent has been secured from the United States Government.

In the case at bar no patent was secured by either the plaintiff or the defendants, and the issue being one involving primarily the right of possession of a portion of the open lands of the United States, it would seem to be in accordance with the broadest principles of justice to have granted de-

fendants' motion that they might submit special questions of fact to the jury.

Section 371, C. C. P. of Alaska, reads as follows:

> "The provisions of chapter fifteen of this title shall apply to actions of an equitable nature except as in this chapter otherwise or specially provided. Both issues of law and fact shall be tried by the Court, unless referred. Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, the Court may direct a statement thereof, and that a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in an action and the verdict may be read as evidence on the trial of the action."
>
> Carter's Annotated Alaska Codes, p. 226, Sec. 371.

We readily concede and there need be no authority cited upon the point by appellee, that it was within the discretion of the trial Court either to submit questions of fact to a jury or not, but we submit that this discretion should be a reasonable one, exercised with due regard to the rights of all the parties to the litigation. The statute is peculiar in that it says "whenever it becomes necessary or " proper to inquire of any fact by the verdict of a " jury".

In view of the fact that the defendants allege possession in themselves in their verified answer and that upon the motion made, the defendant, McCumber, in an affidavit alleges specifically possession in himself as lessee of the ground; and in view of the fact that no counter showing was made

upon the motion, we submit that a clear case of abuse of discretion is shown and that the denial of the right of the defendants to have the question of possession and ownership of the ground submitted to a jury, was such an abuse of discretion as to arise to the dignity of a serious error.

We confess frankly that we are at a loss to understand why the case at bar should have been tried along such narrow and confined lines, and no record can disclose a better illustration of how a narrow trial may prejudice the rights of the parties litigant than the order of the Court in the case at bar denying the motion to submit questions of fact to a jury, coupled with the denial of the motion of defendants to have the case tried by a jury in the first instance.

II.

DEFENDANTS' MOTION FOR A CONTINUANCE OF THE TRIAL OF THE ACTION FOR THE PURPOSE OF RETAKING THE DEPOSITION OF ANDREW JENSEN SHOULD HAVE BEEN GRANTED UNDER ALL THE PECULIAR FACTS AND CIRCUMSTANCES OF THE CASE.

This contention is based upon defendants' proposed bill of exceptions No. 2, which is found on pages 121 to 153 of the transcript.

The objection is specifically made by Assignment of Error No. 3 (Trans. p. 173).

The facts in this regard are as follows:

Andrew Jensen resides in Buffalo, North Dakota, a long distance from the place of trial, and was not in fact present as a witness at the trial.

The affidavit of M. D. McCumber, one of the defendants, shows in substance that after the bringing of the action in November, 1910, he interviewed Tom D. Jensen, who was the son of Andrew Jensen, the original locator of the Moonlight Bench Placer Claim. Andrew Jensen was not only the locator of the said claim, but his name also appeared as a witness to the Grant Location (Trans. p. 228), under which the defendants claim.

At the request of McCumber, Tom Jensen wrote to his father two letters, one of which, Exhibit "A", was attached to the affidavit and is found in the transcript on pages 132 and 133 thereof.

The said Tom Jensen also sent a blue print accompanying his letter, which affiant states was very similar to the one actually used by the plaintiff in the cross-examination of the witness, Andrew Jensen. In reply to the letter of Tom Jensen, his father stated in substance that the claim which he located was "bounded on the end by the Upper "Half of Lindblom's Moonlight Claim" (Trans. p. 125).

In a second letter written by Andrew Jensen to his son, he states, in substance, that he struck Lyng's Claim on Moonlight and then followed up the Moonlight Claim again along the upper end and

that Grant's location stake was set at the upper end of the Moonlight Claim (Trans. p. 126).

Affiant further states in substance that accompanying the letter first written by said Andrew Jensen, he mailed to his son a map showing the position of the claim which he staked as being between Moonlight Claim and Little Creek as claimed by the defendants. That the defendants relied upon this information given to them by Tom Jensen and got out a commission to take the deposition of Andrew Jensen at Fargo, North Dakota, and propounded direct interrogatories to said witness to prove the facts as stated in the said letters and map.

That the defendants tried to get the said Andrew Jensen to come to Nome, and offered to pay his expenses, but failed in that behalf. That when the deposition of the said Andrew Jensen was in fact taken, he contradicted all the material statements contained in his letters upon which defendants relied. That affiant believed the statement of the said Andrew Jensen to be true and had every reason to believe that he would so testify. That affiant has caused a notice of the retaking of the said Andrew Jensen's deposition to be served accompanied by interrogatories which call attention of the said witness to the telegram which he sent to his son and which lays the foundation for impeachment of his statements, if he shall persist in denying the statements made in the letters and telegram; but upon the other hand, if he admits the statements to be true, then the same can be used as evidence in the

case. That affiant desires the case to be continued until the Spring Equity Term of the Court, so that the said deposition may be taken, and so that the defendants may prove by the witness that he wrote the letters and sent the telegram.

Affiant alleges that he expects to prove by the said witness that he talked to other and different persons on behalf of the Pioneer Mining Company, the plaintiff in the suit, and that he received the sum of $1200 at Buffalo, North Dakota, from the plaintiff.

Affiant will also show that the said witness Andrew Jensen drew a map of his own to locate his said claim with a blue print of the Gibson survey before him, and if he shall deny such to be a fact, the affiant will produce said map.

Affiant states that he was advised by his attorneys that the only way that said letters, telegram or map or drawing made by said Andrew Jensen, can be used at the trial of said action is by exhibiting the same to the said Andrew Jensen for identification, admission or denial.

Affiant further states that William Grant locator of the Grant Claim, has long since been dead and that defendants have no other way of denying, refuting and impeaching the statement of the said Andrew Jensen other than by showing the same to be utterly and absolutely false by his own prior statements, telegram and drawing.

Twenty-nine proposed interrogatories are found on pages 138 to 148 of the transcript which show that the defendants in good faith wished to examine the witness Andrew Jensen concerning letters written by him and a certain telegram sent to his son.

The letter Exhibit "A" found on pages 132 and 133 of the transcript and the answer thereto from which affiant quotes in his affidavit, show clearly that if the facts are as stated in said affidavit and letters, the testimony proposed to be adduced was of the greatest importance to the defendants.

We concede that the lower Court was clothed with discretion to deny the motion for a continuance, but we most respectfully suggest that the discretion herein referred to must be a reasonable one and not in any sense arbitrary. While we have for the Judge of the Court below the most profound respect, we are at a loss to understand why the strong showing for a continuance made upon the affidavit, letters and telegram should not have been granted, with a view to doing substantial justice between the parties.

We call particular attention to the fact that no counter showing whatever was made by plaintiff by affidavit or otherwise. So far as the facts are concerned we think it a fair inference (at least for the sake of argument) to assume that the facts as stated in the affidavit of the witness, McCumber were and are true. It is true therefore that if the deposition of Andrew Jensen had been re-taken, he

would either have confessed to an error in the statements made by him in his deposition, or he would have been compelled to admit that he was telling a deliberate untruth in the statements made by him to his son in the letters and telegram.

It is rather a serious situation when we find the defendant McCumber willing to say upon his oath that he expected to prove, and that he would prove that the plaintiffs had paid Andrew Jensen the witness, the sum of $1200 at Buffalo, North Dakota; nor are we confined to the statement of the defendant, because a telegram is produced purporting to have been sent to Tom Jensen by his father in which this same $1200 figures rather conspicuously.

The question as to the exact location of Jensen's claim was one of great importance in the case, as we shall see later on in the argument. If the statements contained in the letters and telegram of Andrew Jensen are true, then it appears that his claim did not overlap the Bob Lyng claim but on the other hand lay outside of it.

It will be observed that the decree in the case at bar places the Jensen location overlapping the Bob Lyng claim. It ought to be the wish of the lower Court in view of this serious condition of the testimony to get at the truth, and since the mining claim involved in the case was certainly not deteriorating in value, a continuance until the opening of navigation would certainly seem to have been a most reasonable request.

Here we have a situation where the most important and pivotal witness of the case resides outside of the jurisdiction of the Court.

In any event it is a most difficult thing to frame interrogatories in such a way as to secure the truth from a witness who is influenced (if such be the fact) to any extent in the direction of not telling the truth, freely and openly. If subjected to oral cross-examination at the trial, the truth may be dragged out of a hostile witness, despite any leaning which he may have to either one side or other of the controversy.

It appears from the affidavit of McCumber and this statement must be considered as true on the hearing of the motion, that the other important witness, Grant, was dead. Jensen, the most important living witness, is testifying through the unsatisfactory medium of a deposition.

So long as there was the slightest doubt as to the fairness of that examination, we submit that a continuance should have been granted in order that the defendants might make the fullest examination of the witness possible.

The defendants were brought into Court in the case at bar to defend their title to a mining location upon which they had expended money and time. It would have been entirely within the scope of a broad conception of equity and justice, to have allowed them every possible means to bring the

truth to the defense of their title and possession to the claim.

The Court will take judicial notice of the climate conditions in Nome, where the lower Court sat at the trial of this case and will bear in mind the fact that the close of navigation makes the procuring of testimony in a case of this kind exceedingly difficult.

The chronology of events so far as this motion is concerned is also interesting and exceedingly significant.

The complaint in the case was filed on November 7, 1910. Tom Jensen at the solicitation of the defendants wrote the letter to his father December 12, 1910; he telegraphed his father July 15, 1911, and received a reply July 28, 1911. The motion to continue the trial of the action was denied October 27, 1911, and the action proceeded to trial November, 13, 1911. The Court will take judicial notice of the length of time necessary in carrying on correspondence between Nome, Alaska, and Buffalo, North Dakota, and we submit that due diligence is shown in a convincing manner by the succession of events preceding the trial of the action.

We repeat in conclusion on this branch of our argument that in view of the fact that absolutely no counter showing was made by plaintiff, we are at a loss to understand why defendants, brought into Court to sustain their title to ground of which they had actual physical possession, should not have been granted the greatest latitude possible in se-

curing the testimony of such an important witness as Andrew Jensen.

We cannot affirm positively that Andrew Jensen does not speak the truth in his deposition, but if he wrote the letters and sent the telegram and received the money as shown in the affidavit of one of the defendants, then surely we have a right to conclude either that great suspicion rests upon the truth of his statements, or at least defendants should have been given the right to remove that suspicion by a further examination of the witness.

If Andrew Jensen had been living within the reach of the processes of the Court below and through negligence of the defendants, he had not been produced in time for the trial, we could find it possible to say that litigation ought not to be delayed, because of the negligence of litigants in procuring their evidence. But when a litigant is burdened with the handicap of not being able to produce a witness in person, and where great doubt exists as to whether a witness is telling the truth in a deposition which he has already given, surely the request to have the deposition retaken, especially where counsel was confined to the narrow limits of interrogatories, is not such a request as would seem to have been made for the purpose of securing delay in the trial of the action. And in this behalf we call particular attention to the lack of any affidavits whatever filed by the plaintiff showing how in any manner he could have been in-

convenienced to the slightest extent by delay in the time of trial of the action; nor is it suggested in any way how the property involved in the controversy could deteriorate in value, if continuance of the trial of the action had been granted.

We submit therefore that the denial of the motion for a continuance under the peculiar facts and circumstances of this case was such an abuse of discretion that the action of the Court was highly prejudicial to the rights of defendants.

III.

THE MOTION FOR A CHANGE OF THE TRIAL JUDGE IN THE ACTION AT BAR SHOULD HAVE BEEN GRANTED UNDER THE PECULIAR FACTS AND CIRCUMSTANCES OF THE CASE.

This proposition is based upon the third bill of exceptions, and the record in support of the motion is found in the transcript from pages 153 to 162, and the alleged error is assigned in Assignment of Errors No. 4 (Trans. pp. 173, 174).

This motion is based upon section 5, part 3, Chap. 1, of the Alaska Political Code (Carter's Code, p. 133) and proceeds upon the theory that the learned Judge of the Court below was disqualified from acting by reason of prejudice against the defendants and in favor of the plaintiff, to such an extent that the defendants in good faith had reason to be-

lieve that an impartial trial could not be had before the said Judge.

An affidavit accompanies the motion made by McCumber, one of the defendants, in which specifically there is set forth a resume of all the motions heretofore in this brief referred to.

Affiant then proceeds to state that he believes that the Judge of the lower Court is biased through friendship in favor of the plaintiff, the Pioneer Mining Company as against the said defendants, and that by reason of said bias and prejudice, said Judge refused to grant defendants a jury trial on the issues of fact prayed for and also refused to grant a continuance of the trial of said action for a reasonable time and that affiant believes that defendants cannot have a fair and impartial trial before said Judge, because of his said bias and prejudice.

It is clearly shown in the affidavit of Elwood Bruner in support of said motion that another Judge would sit at Nome for the hearing of certain specified cases and that the case at bar could be heard. No counter showing is made to this motion by the plaintiff and no facts are presented by affidavit or otherwise in opposition to the facts set forth in the affidavit of the defendant, McCumber, but a purely technical attack is made upon said motion.

The first point of attack is in the nature of a demurrer, the contention being that the said appli-

cation of the defendants does not state facts sufficient to authorize the Court to change the venue of said action, or to call in another Judge to try said case.

The defendant McCumber alleges directly in his affidavit that the Judge of the lower Court is biased because of his friendship for the Pioneer Mining Company, and then facts are set forth showing that the Court upon two specific motions, has employed his discretion entirely against the defendants.

We readily concede that the affidavit of the defendant, McCumber is not so specific in the statement of the acts constituting the prejudice and bias of the lower Court as it might have been, but we are astonished to find that when an affidavit is filed alleging friendship as a ground of bias and other acts which may indicate bias, that no counter-showing whatever is considered necessary, but that plaintiff may simply waive its hand and end the discussion.

We must remember that no reason was given for the denial of the motion for a continuance of the trial. No reason was given for the denial of the motion to submit special issues of fact to a jury. We do not intend to suggest that we consider it necessary for the Judge of the lower Court to give a reason for rulings made, but we do think that the plaintiff should have supplied some facts which would tend to negative the belief, which the de-

fendant, McCumber had as to the bias and prejudice of the lower Court.

It might well be argued that in any event and upon any showing whatsoever which might be made, the defendant McCumber's idea that the Judge was biased against him was all a matter of opinion, but in view of the fact that the learned Judge of the Court was himself passing upon the question of his own bias and prejudice, we must respectfully submit that it would have been better for the plaintiff to have made a counter showing rather than to have depended entirely upon a purely technical attack upon the case made out by the defendants.

The plaintiff charges that the motion was made to delay the trial of the action and that it was not made in good faith. We may well complain that these statements are made by counsel for the plaintiff and are based upon no facts whatever in the record. We do not apprehend that the statements and conclusions of counsel on a motion of this character can take the place of evidence. The affidavit of Mr. Bruner clearly shows that another Judge would appear in the district who could try the case and the mere statement, not under oath, of the attorneys for the plaintiff, would not seem to be sufficient to meet that statement of facts, made clearly and specifically.

We submit, therefore, and again we say that we argue this point with all due and proper respect

for the Judge of the Court below (a respect which is based upon personal acquaintance and friendship with said Judge), that it would have been more in accord with real justice to defendants in view of what had gone before, if this motion had been granted, and we believe that the failure to grant the motion was a clear abuse of discretion under all the facts and circumstances of the case.

IV.

THE OPEN, NOTORIOUS, UNINTERRUPTED, ADVERSE POSSESSION BY DEFENDANTS AND THEIR PREDECESSORS IN INTEREST OF THE CLAIM AT BAR UNDER COLOR AND CLAIM OF TITLE FOR A PERIOD OF OVER TEN YEARS IS CONCLUSIVELY PRESUMED TO GIVE TITLE TO DEFENDANTS, AS AGAINST PLAINTIFF EVEN THOUGH DURING THE ENTIRE PRESCRIPTIVE PERIOD DEFENDANTS HELD POSSESSION OF THE CLAIM IN SUBORDINATION TO THE PARAMOUNT TITLE OF THE UNITED STATES GOVERNMENT.

Under this head of our argument we shall include and discuss assignments of Errors Nos. 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 35, 48, 49, 59, 60, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75.

The question of law involved in all these Assignments of Error is as follows: *Can an absolute possessory title be acquired by prescription, to unpatented public mineral lands, good as against either a prior or a subsequent locator?*

The question of fact involved is as follows: *Does the evidence in the case at bar show beyond serious contradiction that the defendants and their predecessors in interest acquired title to the Grant Claim including the alleged conflict area, by an uninterrupted, adverse, notorious, possession, originating with a claim of title through the Grant Location, and reaching fruition in ten long years of labor, money expenditure and actual physical occupancy?*

We do not ignore the fact that the findings of the lower Court are against defendants as to the facts constituting their possession and the character thereof. But we assert positively that the evidence is clear and uncontradicted in all essential points as to the possession of defendants and the character of their possession. It is not at all difficult to reconcile the findings of the lower Court with the great mass of testimony introduced by defendants (all of which showed defendants' possession and the largest part of which stands uncontradicted) when we know, as appears from the record, that the action was tried by the lower Court upon the theory that no title by adverse possession could be acquired to public lands by one holding possession in obvious subordination to the United States. Since the lower Court believed this to be the proper principle of law applicable to the situation which confronts us in the case at bar, no amount of testimony and indeed no kind of testimony, on the question of possession, would influence the lower Court to find for defendants. It is admitted that the defendants held the

claim in subordination to the title of the United States. Never could they have acquired title as against the Government except through a patent. Never could their prescriptive title ripen into a fee or even into a possessory right as against the United States. The lower Court concluded, therefore, that no title by adverse possession is possible under the facts of the case at bar, and that therefore the findings should be against the defendants.

We contend that this error of law was woven through the entire web and woof of the case, and that defendants were deprived of a valuable property becouse of this serious misconception. We are not depending on surmise or speculation in this regard but fortunately we can point to the opinion of the learned Court below rendered in giving his decision, which shows the error of law involved (Trans. pp. 104, 109). Perhaps it is not amiss to say that the lower Court considered the principle of law which he was applying to the decision a doubtful one because he said "it is the wish of the "Court that defendants appeal their case to the " proper tribunal to correct any errors that may " have occurred during the trial" (Trans. p. 109). Since it is not the function of the appellate Court to determine disputed questions of fact, and since a large part of the errors assigned involve directly and indirectly this principle of law, we think we are correct in saying that this remark applies particularly to the question involved under this head of our argument, which question seemed a close one

to the learned Court. We shall divide our argument upon this subject into two parts:

(a) **The evidence clearly shows adverse possession in defendants for the statutory period, and (b) Defendants' title by prescription is established as a legal conclusion from the facts proved.**

(a)

THE EVIDENCE CLEARLY SHOWS ADVERSE POSSESSION IN DEFENDANTS FOR THE STATUTORY PERIOD.

A. G. KINGSBURY.

(Trans. pages 428-490.)

"The stakes and mounds of the Grant Claim as marked on the ground at the time of trial are the same as they were in the last of July or August, 1899, when I first saw the claim. The corners and initial stakes of the Grant Claim were at that time plainly visible. I was there with Mr. Grant in July or August, 1899, and there were no markings or monuments of any kind within the boundaries of the Grant Claim.

"Mr. Grant showed me where he had been working on the claim. I took an option on the ground, gold was found within the boundaries of the claim.

"Later in August, 1899, I took a second option. I organized or assisted in the organization of the Corwin Trading Company. I was their agent and in full charge of their affairs. I was on the Grant Claim in the spring of 1900. I inspected the bound-

aries and corners and the initial stake was still standing in the same places as they now stand. In 1900 I did quite a little prospecting and worked the southern end of the claim for the Corwin Trading Company. One of my men, Coney Weston, on the lower half of the claim drove a shaft say ten (10) feet, and then he dug north about the same depth. When I speak of the lower half of the claim, I mean the half upon which the initial stake was set toward the southwest corner of the claim. I know that part of the work done by Coney Weston was on the part of the claim in controversy. There never was any other person but him and my men in the physical possession of the Grant Claim or the ground within the boundaries of the Grant Claim in 1900, nor was there any markings or stakes or monuments within the exterior boundaries of the Grant Claim in 1900 to my knowledge, and I frequently rode by the claim in 1900.

"I was the manager or agent of the Pacific Coal & Transportation Company 1901, and this corporation was organized in that year to take over the properties of the Corwin Trading Company. I was on the claim in 1901 a great many times and the corporation was in the possession of the claim in that year. Quite a little prospecting was done under my direction. Work was done by A. D. Rogers and Mike Leary, and they sunk a shaft north of the work done by C. Weston. The shaft was fourteen (14) feet deep and they also dug a trench in the hill running northwest and southeast. The stakes of

the Grant Claim were standing during that year the same as they were pointed out to me by Grant in 1899. I made larger mounds around the stakes in that year, sod mounds. I put a good-sized mound around the initial stake and the shaft dug in 1901 must have been within the ground in controversy.

"In 1901 I also filed an amended location of the claim."

(NOTE. The Court at this point sustained an objection to the witness testifying as to whether any person was in the physical possession or claimed the physical possession of any of the Grant Claim in 1901.)

"I was on the Grant Claim in the summer of 1902 a great many times and was the agent of the Pacific Coal & Transportation Company and in charge of its affairs at Nome. The work done in 1902 consisted of digging around the lower part of the claim. Some of the work was inside the limits of the ground in controversy, and some of it was north. I put some new stakes out in 1902. I took some jumper stakes out and threw them away.

"The photographs which you show me, defendants' Exhibits 17, 18, 19, 20 and 21, are photographs of the stakes of the Grant Claim replaced by me on the claim in 1902. The photograph which you show me, Exhibit '22', is a picture of the cabin on the Grant Claim. It is on the south part above the railroad. The picture which you show me, defendants' Exhibit '23', is a shaft near the southwest corner and within the ground in controversy. It also

shows the Bard and Muther tailings. These are the tailings from the work done on the claim in 1904-1905, which work was within the ground in controversy.

"The picture which you show me, defendants' Exhibit '24', shows the tailings on the south half of the claim. It is a picture of the ground in controversy and shows piles of rock or tailings of the work of Bard and Muther and the Russians. These people were laymen under the Grant title.

"I gave Pat Winter and George Crawford a lease of the Grant Claim on behalf of the Pacific Coal & Transportation Company in 1902. The lessees took possession of the Grant Claim and worked near the southwest line of the claim within the ground in controversy. I caused the claim to be surveyed in 1902 by Mr. Arthur Gibson, and he furnished me with a blue-print of the survey. He surveyed it with reference to the mounds I identified, the same mounds as shown in the photographs. There was several hundred dollars of work done on the claim in 1900 and 1901 according to the current amount of wages and there was more work done in 1901 than in 1900.

"Miss E. L. Howard was the agent of the company in 1903. I crossed the claim in 1905 nearly every day and saw the initial stake and the corners still in the places as when I first saw them. I was on the claim in 1906 and 1907 and observed the work

being done on the claim by Bard and Muther. They were working on the southwest end very near the initial stake, sinking shafts and tunneling and taking out a dump of pay gravel and they sluiced during the summer. Their work was on that portion of the ground in controversy. I saw the Russians working in 1905. I executed a lease in the fall of 1902 to Howard and Doverspike. They worked on the claim in 1902 and 1903 and took out dumps on the southwest end within the ground in controversy. There could not have been less than $5000 worth of work done on the Grant Claim from 1900 to 1907 and during that time no one to my knowledge ever made claim to any of the ground except the incident on the jumper stake to which I refer.

"The Pioneer Mining Company and its grantors never made any claim to any portion of the ground to my knowledge, nor did Mr. Andrew Jensen or D. W. McKay. I never in the earlier years heard of any claim known as Moonlight Bench No. 1 or No. 1 Bench on Moonlight, and there were no monuments or markings of any kind which I saw to indicate such a claim. The first time I ever heard of the Pioneer Mining Company claiming a portion of the Grant Claim was at the time they started suit in the fall of 1910. Mr. McCumber was conducting mining operations on the ground in October or November, 1910, and his men were living in the red cabin shown in the photograph."

ETHEL LUELLA HOWARD.

(Trans. pages 493-504.)

"I know the Grant Claim. I own some mining claims in the vicinity of the Grant Claim, and have owned property in that vicinity since 1900. I passed over the Grant Claim two or three times in the summer of 1900 and I had charge of the property of the Pacific Coal & Transportation Company. I signed as a witness the amended location notice of the Grant Claim about the 4th day of October, 1901. I do the physical work of mining, digging and mining, and I have done that character of work including prospecting for a number of years. I saw the amended location notice on the Grant Claim in 1902 while doing work in that vicinity. The notice was on the initial monument stake of the Grant Claim. I knew the Lyng Claim, and the amended notice that I speak of was at the easterly end of the Lyng Claim. I was left in charge of the property of the Pacific Coal & Transportation Company in the winter of 1902. Howard and Doverspike and their partners performed work on the Grant Claim during the winter of 1903, they were taking out a dump there and did some prospecting. There were four men all of the time working there, and I think they had five men part of the time. They commenced to sluice in the middle of May, 1903, and quit work when the injunction of the Moonlight Springs Water Company was served upon them,

and the dumps were washed up after June, 1903, to my knowledge."

(NOTE. The Court refused to allow the witness to testify as to the value of the work done on the Grant Claim by Howard, Doverspike and their associates in the winter of 1902 and spring of 1903.)

"While I had charge of the Grant Claim I never heard of any one making any claim to the ground embraced within its boundaries."

(NOTE. The Court refused to permit the witness to testify as to whether the Pioneer Mining Company, Andrew Jensen, or D. W. McKay or anyone on their behalf made any claim whatsoever to any part of the Grant Claim, although the Pioneer Mining Company was mining on adjoining ground in that vicinity.)

"W. H. Bard succeeded me July, 1903, in the care and attention of the Grant Claim. Mr. Hopkins and his partners were working on the Grant Claim in the fall of 1903 near the place where Howard and Doverspike worked, and the work done by Hopkins was within the ground in controversy. I observed the boundaries of the Grant Claim while I had charge in 1902-1903 and the boundaries were marked. The initial stake had a good-sized sod mound. I saw the stake at the southwest corner, and the stake marked 5 at the northwest corner and the stake marked 4 at the northeast corner and the stake marked 3 on the southerly corner, and I recognized all these stakes as the ones I saw Mr.

Kingsbury paint in the office of the company in October, 1901. I never saw any stake in the vicinity of the northeast corner of the Grant Claim other than the Grant Claim stake prior to the latter part of October, 1902, and I was at the camp out there a great many times and was passing up and down to Moonlight Springs for water."

ROBERT LYNG.

(Trans. pages 504-528.)

"I located the Moonlight Claim in November, 1908. I know a man by the name of Andrew Jensen, and he had a claim near mine. I knew William Grant. His claim was east of mine, and his initial stake was identical with mine and was in the same mound that I had erected.

"I saw Grant in the vicinity of Moonlight Claim. I was on his claim. It extended from my upper end in an easterly or northeasterly direction. Grant was camping and at work on his own claim adjoining the Moonlight in May or June, 1899. He was prospecting. Jensen was also on his claim the day Grant and I were there. I do not know anything about a claim called No. 1 Bench Moonlight in 1899 and I never saw any stakes or monuments of any kind or character indicating where that claim was. The only claim in that vicinity that conflicted in any way with my Moonlight Springs Claim was what was called No. 6 Goodluck, the one that Jensen

was camped on in the summer of 1899. He claimed that the northeast corner of my claim had been moved over on his ground."

(NOTE. The Court refused to permit the witness to testify that no one made any claim to any portion of the witness' claim and especially that the Pioneer Mining Company and none of its predecessors made any such claim.)

FRANCIS M. WARSING.

(Trans. pages 536-547.)

"I know the Grant Claim and got acquainted with it in March, 1902. I was working on the Gaffney Fraction about 400 feet from the southwest corner of the Grant Claim. In the summer of 1902 I observed Mr. Winters and Mr. Crawford working within the Grant Claim boundaries on the western end running an open cut, and they were working on the ground in controversy.

"In the fall of 1902 I observed George Doverspike, Fred Williams, Billy Schue and Mike O'Leary with C. T. Howard working on the Grant Claim. I think that was in September, 1902. They were working on the southwesterly end within the ground in controversy, and they had a cabin there. They were digging shafts. They worked on several shafts. They commenced in 1902 and worked continuously until May, 1903. They hoisted gravel near the shaft. I was at the bottom of their shaft but did not go into their stopes. They took out six dumps.

They took out about 310 or 312 ten-pan buckets in each dump. They did sluicing and actual mining in the spring of 1903 and they quit in the spring of 1903 because an injunction was filed against him. A portion of the dumps was washed up, the balance remained, and the rest of the dumps were washed up in 1903 by Hopkins and Muther. The dumps were visible. I first saw Hopkins and Muther working on the Grant Claim in August, 1903. Hopkins worked about ten (10) days on the southwesterly end of it, near the same place where Howard and Doverspike had worked. When Hopkins quit work, Muther and Bard continued. I lived out there during the month of September and October, 1903, and I was in plain sight, where I was working, of the most of the Grant Claim. There was no one else other than Mr. Hopkins and Mr. Bard working within the boundaries of the Grant Claim at that time. If the Pioneer Mining Company had any men digging in that portion of the claim, I should have seen them from where I was. There was nobody else working on that part of the claim. Muther and Bard were working at that time within 200 feet of the stake, and Muther and Bard in the fall of 1903 were living just past the railroad track, and they lived there all the winter of 1903 and 1904. They were sinking holes there and prospecting and abstracting several small dumps and in the spring of 1904 they sluiced them up. In the summer of 1904 Muther and Hopkins worked on the Grant Claim on the west end about 400 feet from the springs. In

the summer of 1904 I had an option of a lease from Muther on the Grant Claim. I did some work on the Grant Claim prospecting. I sank four holes 19 and 24 feet deep on the southwest part of the Grant Claim within the ground in controversy. I observed further work on the Grant Claim in the fall of 1904 and the spring of 1905.

"The operations were carried on by Oscar Margraf and John Rieck. I never heard of a claim called Bench No. 1 off Moonlight. From February, 1902, until the spring of 1905 I never heard or knew of any conflict between any other claim and the Grant Claim."

(NOTE. The Court refused to permit Warsing to testify that while he was working on the ground under option from Muther no one molested him or interfered with him or claimed that he was working the ground not belonging to defendant.)

"I knew of a tunnel constructed on a portion of the claim in the fall of 1904. I was in the tunnel and they were in about seventy (70) feet. It was bedrock work on the southwest part of the Grant Claim, the part of the claim in controversy. During all the time I was working in that vicinity from February, 1902, until the spring of 1905, I did not see anybody else working in that vicinity other than the men I have named and the laborers that worked for them.

NICHOLAS R. BARGE.

(Trans. pages 547-549.)

"I first knew the Grant Claim in 1901 and 1902 and in the summer or fall of 1901, I observed some men working on the claim. I know where the boundaries of the claim are, because I assisted Surveyor Dan Jones in chaining at the time he surveyed the claim. The men that I saw working there in the fall of 1909 were, I believe, working in the ground in conflict. In 1902 I saw men working on the southwest end of the claim in the same place that the men were working in the fall of 1901. During the winter of 1903 I was upon the Grant Claim lots of times and men were engaged in mining in that portion of the claim. Their work was visible to anyone passing along the surface. I observed Muther and Bard working on the Grant Claim, and I knew the men that were working for them. Muther and Bard had cabins on the Grant Claim and I saw them in 1904. The cabins were a little northeasterly about 400 feet I guess from the southwest corner of the claim and on the ground in controversy. The men were doing work there at the time sinking shafts and taking out dumps. In 1904 and 1905 there was a dump there that was very close to the line as I remember it now.

"In 1905 I was familiar with the Grant Claim and tried to get a lease of it and made an investigation with that in view."

CHARLES OLSON.

(Trans. pages 549-554.)

"I know the Grant Claim and first saw it in 1899. I was in the locality of the initial stake in 1900. In September, 1900, there were two men working on the claim, and one looking on. I was in the red cabin and I can point out on the map the place where the men worked in 1900. I know that Hopkins was working on the Grant Claim in 1903 with Muther. Muther lived in a cabin standing about twenty feet east of the railroad track, and when I was on the claim about ten (10) days ago, Captain Smith was living there in a cabin."

SIDNEY MOORE.

(Trans. pages 554-556.)

"I know the Grant Claim and I acted as a chain man for Gibson when he surveyed the claim in September, 1902. Williams, Howard and Doverspike lived in a cabin on No. 2 East Fork Moonlight in the winter of 1902 and 1903 and I saw them working on the southwest portion. They were sinking shafts and doing rocking in the hole."

AL. BROWN.

(Trans. pages 556-559.)

"I was in the vicinity of the Grant Claim in the spring of 1905. I know Muther and he was mining

on the west end of the Grant Claim then. He was engaged in sinking shafts and stoping out, and his work was open and visible to anyone crossing the claim in that vicinity. I worked myself in 1905 on the Grant Claim for Muther and Bard. I worked about twenty-five or twenty-six days in the last part of March or the first of April. I sank two shafts and worked underground stoping out the running drifts.

"The work done by Muther and Bard in 1905 was within the conflict area and Muther and his men in 1905 lived in the cabin just east of the railroad track."

(NOTE. The Court refused to permit the witness to testify that during March and April, 1905, neither the Pioneer Mining Co. or anyone in his behalf made any claim while he was working there to any portion of the ground he was working on.)

"I saw Margraf and Rieck working on a portion of the Grant Claim in 1904. They were sinking shafts and running a tunnel, and I was in the tunnel where they were working once. The tunnel is four (4) feet wide and possibly four (4) feet high and about 65 or 70 feet long.

"In the fall of 1905 there was some Russians working out there and they were sinking shafts when I saw them and were quite close to where Muther was working."

EVERETT SUTHERLAND.

(Trans. pages 260-265.)

"I am acquainted with the claims in the vicinity of Moonlight Springs. I first got acquainted with them in the fall of 1904. I lived in a cabin with Ai. Brown and Hall two hundred (200) feet from the Grant Claim and in plain sight. In the winter of 1904 and the spring of 1905 I saw Mr. Bard and Muther and also Margraf and Rieck working on the Grant Claim. They were prospecting when I observed them sinking shafts and running drifts. During all the time I was out there I never heard of a claim called Bench No. 1 Moonlight."

GEORGE KNOCHENKA.

(Trans. pages 565-568.)

"I got acquainted with the Grant Claim in 1905 and worked thereon for Bard and Muther. I started to work in January, 1905, working down in a drift with pick and shovel for wages. Sometimes they had five men and sometimes more, more times seven men at work. Men were working in two places on the ground, working in shifts. In one place they were working down in a shaft hoisting up dirt to make a tunnel. I worked a couple of days on the tunnel. The shafts were put sixteen or seventeen feet deep. They took out dumps that year, but

I do not know the size of the dumps, and they were hoisting all winter.

"I also worked with some Russian boys there during the winter of 1905. I worked for about three months. The Russian boys had a lease from Bard and Muther. Four men were working. We took out a small dump in the winter of 1905. We lived in two small cabins close to the railroad. I sold out in January, 1905, but after I sold out returned later on to the claim in the springtime. The other Russian boys continued to work after I left prospecting and did some other work. In the summer of 1906 they sluiced that dump. One of the Russian boys is dead and the other has gone to Siberia. The place where I worked for Bard and Muther is within the ground in controversy. No one connected with the Pioneer Mining Company ever tried to claim the ground where I and the Russian boys were working at that time."

August Carlson.

(Trans. pages 568-569.)

"I know the Grant Claim and first knew it in the winter of 1905. I was employed there the middle of February by W. T. Bard. I worked about a month, and perhaps a little more. We were sinking shafts, making tunnels and stoping, and we took out three dumps, two small ones and one good-sized one. There were nine men employed there at

the time I worked there including Mr. Muther. We lived in the cabins on the east side of the railroad track. We sunk three shafts on the ground in controversy. I know of a tunnel that was constructed there also. I did not work in it but was in it. I went down twenty or twenty-five feet into the tunnel."

ISAAC J. KORTRIGHT.

(Trans. pages 569-571.)

"I know the Grant Claim and knew Captain Sperry very well. He was working on the Grant Claim. Sperry had charge of the Grant Claim and I think he is dead now. I did the work which I did for a man who was employed by Captain Sperry, and Captain Sperry was there every day doing panning.

"I worked in the spring of 1907 after the break-up and assisted Mr. Red Wood in removing the drill from the premises, but I do not know how long he had been drilling on the Grant Claim. The hole that was drilled while I was working there was something like sixty (60) feet in depth. I recall it was on the first plateau or bench."

ALBERT HARTMAN.

(Trans. pages 571-572.)

"I know the Grant Claim and first knew it in 1907. I worked upon it for Louis Woods and he

was working for Captain Sperry drilling. I worked there two days. Mr. Woods had been drilling on the Grant Claim prior to the time I went there but I do not know how long."

EUGENE MINER.

(Trans. pages 572-573.)

"I know the Grant Claim. I knew both Muther and Bard and I saw them on the claim mining, I think, in 1904 or 1905. They were in a cabin there right near the railroad track, a cabin with a canvas shed to it. I saw some shafts there and dirt thrown out pretty near it, a dump thrown out."

S. D. WAYSMAN.

(Trans. pages 573-577.)

"I know the Grant Claim and got acquainted with it in 1906 or 1907. I drilled on it for Captain Sperry. He told me he had a lease from the Pacific Coal & Transportation Company, and I must have drilled there for two weeks. I drilled with a man named Wood. He had a 6" bit with gasoline power and we drilled six or eight holes on the west end of the claim about 200 feet from where Moonlight Springs are, and we lived out there at the time in a black cabin that stood east of us. At the time I was drilling there I became acquainted with the cor-

ners of the Grant Claim and the black cabin was within the boundaries. We drilled west of the railroad. We must have drilled in about six places six or eight holes, and the holes as indicated on the map were within the conflict area. We found gold at the time we were drilling in the southwest corner of the claim, and I made an effort to get a lease at that time. I did not see anyone else in possession other than Captain Sperry and Wood or did I see anyone working within the boundaries of the ground and no one else claimed the ground while I was working there, and no one made any objection or protest to our drilling on the ground."

W. H. Bard.

(Trans. pages 577-585.)

"I acted as attorney for the Pacific Coal & Transportation Company from June, 1903, until June, 1906, and know the Grant Claim, and managed it for the said corporation until 1906. I had a lease in 1904 and 1905 with J. C. Muther and we mined the claim. We extracted winter dumps from a point within the conflict area. So many people have attempted to point out the location of Moonlight Bench No. 1 to me that I was never able to satisfactorily fix the boundary lines of said claim fully. The Pioneer Mining Company never at any time claimed any part of the gold that was mined

by me or my associates or the laymen of the Pacific Coal & Transportation Company on the ground.

"Howard and associates were working on the westerly end of the claim when it was turned over to me and thereafter Margraf and associates had a lease of the property during the winter of 1903 and 1904 and Muther and I had a lease from 1904 and 1905. During the summer of 1905 Hopkins and Belvail worked the property. I executed leases to Muther and myself and to Hopkins and Belvail and Margraf and associates, Margraf and associates worked all over the claim, but the others worked within the conflict area, and the Pioneer Mining Company did not enter any protest so far as I know. The Pioneer Mining Company did go on the claim in my absence and do some assessment work. The Pacific Coal & Transportation Company were in the actual physical possession of the westerly end of the claim during the years 1903, 1904, 1905 and 1906 to my knowledge and during the time that I was in charge of the claim, the Pioneer Mining Company never tried to exercise any possession or ownership over said westerly half with the exception that in 1904 Mr. Lindeberg sent over a man who informed me that Lindeberg had requested me to stop working, but I put the man off the claim, and never heard anything more of it.

"I saw the stakes of the Grant Claim. They were large, substantial stakes plainly marked and indicated the center and corners of the claim, and

in 1903 there were stakes that thoroughly marked and fixed the corners and centers of the claim. I examined the stakes very thoroughly many times in 1903. I never knew definitely where Bench No. 1 Moonlight was located. The Pioneer Mining Company know that the claim was being worked by the Pacific Coal & Transportation Company. I was furnished water from the ditch of the Pioneer Mining Company to clean up within the spring of 1905. The managers of the Pioneer Mining Company have always known during my time that I was connected with the Pacific Coal & Transportation Company."

S. Lynn Fox.

(Trans. pages 585-586.)

"I know the Grant Claim and first got acquainted with it in 1908. I know the defendant, M. D. McCumber, and entered into a contract with him to do a certain amount of work on that claim. My associate was Ben Hersey. I contracted to sink a shaft one hundred (100) feet deep and went on the claim that fall and sunk a shaft in December, 1908, twenty-four (24) feet. We lived at that time on the Grant Claim. We continued the work in January, 1909. We sank the shaft 84 feet. Mr. McCumber paid us for the work. We started on the 8th of December, 1908, and worked until the 21st and then started again on the first of January and worked until the 20th of April, working continu-

ously. I executed an annual proof of labor for the Grant Claim for Mr. McCumber for the year 1908. I was acquainted with the boundaries of the Grant Claim and have been around them several times and no one else occupied any portion of the Grant Claim at the time Mr. Hersey and I was there."

BENJAMIN A. HERSEY.

(Trans. pages 587-589.)

"I know the Grant Claim and got acquainted with it in 1908. I became familiar with its boundaries and markings. I worked on the claim for McCumber with Mr. Fox and we lived on the claim. We did the work as testified to you by him. I also did some surface prospecting. I know the portion of the Grant Claim in controversy, and I know where the railroad crosses the west end of the claim. I did considerable prospecting west of the railroad track. I would dig a ditch like and would dig beneath the sod and see if there were any surface diggings, and I had to dig away considerable snow to do my prospecting, and the prospecting work which I did was within the bounds of the ground in controversy. During the time I was working and living on the ground, no one else was living on the ground or in actual possession of any of the ground in controversy."

STEVE JOHNSON.

(Trans. pages 589-591.)

"I first got acquainted with the Grant Claim in 1907 and knew Captain Sperry and Captain Aansen. I did some work with Captain Aansen with a drill on the Grant Claim in 1907. We drilled the upper end of the hillside toward the northeast corner of the claim. We drilled a hole about 104 feet deep and were paid $2.00 a foot for the work by Sperry. At the time we were drilling there was another drill at the end of the claim which we called Red Wood's drill. He was drilling in the southwest corner."

OLE ANSON.

(Trans. pages 591-595.)

"I have known the Grant Claim since the spring of 1907. I put a hole down there to bedrock, and was assisted by S. S. Johnson. We did the work for Eugene Sperry. Mr. Wood's drill was standing down towards what is called the southwest corner, at the time I was working the claim. I saw Mr. Wood drilling. I do not know exactly how long he drilled there, but he drilled there any way during the time I put down two holes on the Martin Bench, probably about three weeks. I never observed anyone else working or living within the boundaries of the Grant Claim other than the ones I have mentioned during the time I was there."

ADOLPH MEYER.

(Trans. pages 594-615.)

"I know Mr. McCumber and I know the Grant Claim and got acquainted with it on the 3rd day of November, 1909. I know where the monuments and stakes of the claim are. I moved a red cabin on the Grant Claim on the 3rd day of November, 1909, and the cabin is still there and has been on the claim ever since I put it there, in exactly the place where I put it. The cabin is on the part of the Grant Claim in controversy in this lawsuit. A man by the name of Pelitsch and I did some mining and sinking a shaft on the claim in 1909 below the railroad track towards Moonlight. We dug a hole about 17 feet deep, and we dug other shafts afterwards. In the southwest corner we dug a hole about 11 feet deep and struck a slide. We continued to work again on the 3rd of November, 1909, all winter. Besides Pelitsch, a man named Fitzlaff was working there for wages and John Kobovich. After Pelitsch quit I had a partner named Louis Kern. Albert Miller also worked there. Also John Alderhall, Leo Wilhelm and a Russian named Malkoff, and a man by the name of Herman Fleming, and Henry Kern. We dug more shafts, and dug one shaft 28 feet deep, using a 6 H. P. boiler and 2" pump."

(NOTE. The Court refused to permit the witness to testify that he had determined there was a channel at that point in the shaft.)

"This shaft caved in and we dug another shaft at that point, a little above ten feet away, toward the southwest corner stakes. It was a big shaft. We timbered that shaft and I was working at it about a month. I had an arrangement with Mr. McCumber to dig 150 feet, shaft 150 feet, and if I struck pay I would get a sub-lease on the 150 feet of the ground for one year. Mr. McCumber employed men to work on that shaft with me and paid them. The men whose names I have mentioned worked on the last hole. During this time I lived in the red cabin. Defendant's Exhibit 22 is a photograph of the red cabin. I put it on the claim and lived in it while I was digging these shafts.

"I know Mr. Stevenson of the Pioneer Mining Company. He was there and saw us working and never made any objection. The last shaft that was timbered we worked on about a month from the 10th day of March until the 22nd of April, 1910, and after I finished, I left the tools in the cabin, and left the cabin on the 12th day of May, 1910. After I left the shaft I did some other work. I put boards on top of the cribbing and covered the shaft all up, so as to save it for the next winter so it would not cave in. I intended to go back and work in the same shaft. The shaft was 35 feet deep and very close to bedrock, and I found gold at 29 feet pay ground, and from the 29 foot level, I panned down to 35 foot level and got pay ground. From the 12th of May until the fall of 1910, I was living near the claim, and was coming out by the claim.

I had charge of the claim that summer for Mr. McCumber. Yes, I had things in that cabin that summer, winter bedding, a bag, an axe and saw and powder. From the 12th of May until the fall of 1910, I was there four or five times a week on the ground and had charge of the claim for Mr. McCumber. I went back to the claim on the 27th of October, and on the 27th of October, I was bringing out the stuff and moved that old stove out, and put it in and took the old rusted stove out, and was on the claim about an hour.

"On the 29th of October, I moved out grub. I moved out stove-pipes and building paper and was there about a couple of hours. At that time I was bringing out stuff for working in the winter and living there. On the 30th of October I took out a few coal sacks and dishes, a big bucket and small barrel, I put them in the house there, the cabin, and was on the claim about three-quarters of an hour. I was on the claim again the next time on the 31st of October. I moved out some lumber for fixing up the cabin. I got that lumber at Mr. McCumber's yard. I was next on the claim on the 2nd of November, 1910, and I moved out a sack of coal and took it out with my dog team. I was next on the claim on the 3rd of November, 1910. On that day I brought out a windlass drum, cribbing and a cable. The cable for sinking a shaft. The windlass drum also for sinking a shaft. I was looking after the rim of the shaft. I was going to sink a new shaft. I was next on the claim on the 4th of

November. I brought out my bedding and the rest of the coal sacks and the big boiler, and I came back to the claim on the next day of the 5th of November. That day I brought out my grub and did some work. I brought out two stove pipes, a six inch pipe and caps for the top on the roof, and I brought the stove pipe in and wanted to make it smaller. After that I brought the water and started a fire and then I was living there on the 5th of November. When I was fixing my stove pipe I was on the roof of the cabin, and I slept in the cabin on the night of November 5th. On the 6th of November I was there in the cabin. I brought a little water for breakfast, after that broke a few boards, that was the new shaft. The 3 x 4 boards were broken in pieces, and where the timber was held in the shaft, that was broken in two pieces. During those days the 5th and 6th of November, I put building paper on the cabin, on the northeast side. I was engaged in carpenter work on the cabin, hammering and driving nails. I did some work down around the shaft on the 6th of November and fixed the cabin on the inside and outside and went on the roof and started to put on the building paper. On the night of the 6th I stayed in the red cabin. On the 7th of November I was on the Grant Claim fixing up the stove and putting building paper on. I was all day on the claim and around the cabin. Between the 27th day of October and the 7th of November, 1910, I did not see Mr. Stevenson in that vicinity nor did I see anyone working on the 6th

or 7th of November, near by where I was living. They were working close to the railroad track 500 or 600 feet towards Little Creek."

A. G. KINGSBURY.
(Recalled)

"I advertised Mr. Grant and his assigns out in the years 1900 and 1901."

(NOTE. The proof of labor in the nature of an affidavit by A. G. Kingsbury showing $100 worth of work done on the Grant Claim for the year 1900 was introduced in evidence.)

(NOTE. An attempt was made to introduce proof of labor signed Pacific Coal & Transportation Co. per A. G. Kingsbury, showing labor done on the Grant Claim for 1901, but the Court refused to permit the same.)

(NOTE. An attempt was made to introduce proof of labor signed by A. G. Kingsbury showing work performed upon the Grant Claim for the year 1902, but the offer of proof was rejected by the Court.)

(NOTE. An attempt was made to introduce proof of labor signed by B. G. Simmons and J. Bunt showing work performed on the Grant Claim at the expense of the Pacific Coal & Transportation Company for the year 1903, and the attempt was successful and the proof of labor was admitted in evidence.)

GEORGE D. SCHOFIELD.
(Trans. pages 626-638.)

Proof of annual labor for the year 1906 on the Grant Claim, said proof being made by W. H. Bard, was introduced in evidence.

Proof of annual labor upon the Grant Claim for the year 1907, signed by Eugene Sperry, was admitted in evidence.

Proof of annual labor on the Grant Claim for the year 1909, signed by Ben Hersey and S. Lynn Fox, admitted in evidence.

Proof of annual labor for the year 1909 on the Grant Claim, signed by Ben Hersey, was admitted in evidence.

Proof of annual labor on the Grant Claim for the year 1910, signed by M. D. McCumber, was admitted in evidence.

(Note. The Court refused to admit in evidence an Amended Water Right Location Notice bearing date July 17, 1905, made by the Pacific Coal and Trans. Co., through W. H. Bard, agent.)

The purpose of the location notice was to locate and appropriate all the water running through the Grant Claim.

Louis Kern.

(Trans. pages 638-641.)

"I know the Grant Claim and worked on the claim from the 12th day of February to the 5th day of May, 1910, with Adolph Meyer. I attended to the boiler and pumps as engineer, and while working there lived in the red cabin. We worked on the southwest corner of the claim about 50 or 60 feet from the corner right near the line. We

dug a shaft about 27 feet deep. I worked on the first shaft that was dug. It was a 4 x 8 shaft. We had a pumping station down in it. We had two, a pumping station down in it—a stationary pump. We had two pumps in the shaft all the time, one was stationary, the other a steam pump. We pumped all day and night. The second shaft was about 35 feet. No one molested us while we were working there. Neither the Pioneer Mining Company or anyone on its behalf made any claim to the ground while I was there. I never remembered seeing Mr. Stevenson on the claim. I lived in the red cabin on the claim from the 12th day of January to the 5th of May."

HENRY KERN.

(Trans. pages 641-644.)

"I know the Grant Claim and got acquainted with it in the year 1904-1905. I worked on the claim in 1910, from the last of March until the 27th or 28th of April, and I worked for McCumber and Adolph Meyer. I worked on top handling a windlass, and also did some other work besides. We worked on the southwest corner about 50 feet to the north near the line sinking a shaft. I worked on both the shafts. We had three boilers and four pumps there. No one else was on any part of the Grant Claim, other than the men working for and with Adolph Meyer during the time I was there.

Neither did the Pioneer Mining Company or anyone on its behalf make any claim to the ground in my presence during the time I was working there. I was paid in full by Mr. McCumber. I first knew the claim in 1904 and 1905. I passed by there in 1904 and 5. Mr. Muther was working the ground. I knew him. He had a pan and was panning."

ALBERT MILLER.

(Trans. pages 644-646.)

"I know the Grant Claim and first got acquainted with it in 1910, and performed labor for Mr. McCumber in March and April of that year sinking shafts. The first shaft was 27 feet deep and the second 35 feet, and I worked down in the hole."

(NOTE. The Court sustained the objection to the witness testifying as to whether or not that shaft was in what is considered an old channel.)

"I saw the red cabin while I was working there. While I was working there, there was no one else in possession of the conflict area of the claim. I know where the boundaries of the Grant Claim are. I know where the southwest corner is. We were working from 80 to 100 feet from that corner. I did not see Stevenson on the Grant Claim while I was there."

JAMES WALET CHARLES.

(Trans. pages 646-647.)

"I have known the Grant Claim since 1904 and 1905. Mr. Muther was working on the claim then. I should say in the hole about 20 feet east of the railroad track close to the dam. I worked on the claim in June, 1911."

(NOTE. The Court refused to permit Mr. Charles to testify that he resided on the claim and was employed by McCumber from the 1st of May, 1911, until the 7th of July, 1911.)

THOMAS D. JENSEN.

(Trans. pages 650-682.)

"I am the son of Andrew Jensen and I know the Grant Claim in the vicinity of Moonlight Springs. I had correspondence with my father Andrew Jensen during the fall of 1910 and the spring of 1911 with reference to the ground in controversy in this action. The first letter was written during the first days of November, 1910, and the last one a little before the middle of December, 1910. I received a reply from my father to both the letters. I have not either of the letters which he wrote in reply. One I destroyed and the other I could not find. I destroyed one of them because I did not wish to

introduce them as evidence in this case. One of them I think was in my sister Katie's handwriting."

(NOTE. The Court refused to permit the witness to testify as to whether the letter informed him that the letter was written at his father's dictation.)

(The Court refused to permit the witness to testify that a letter which he had written dated Concil, Mar. 28th, and written to William A. Gilmore, attorney, contained a correct quotation from the letter which the witness destroyed with reference to the matter in controversy in this action.)

(The Court also refused to permit the witness to testify that he copied some parts from his father's letter, when he wrote to Mr. Gilmore.)

(The Court refused to permit the letter written to Mr. Gilmore to be introduced in evidence, which letter is defendant's Exhibit "C" and is marked defendant's Exhibit 50 for identification.)

(The Court refused to permit the witness to testify that the letter dated Alaska, April, 1911, written to Gilmore, contained a correct quotation from his father's letter with reference to the ground in controversy.)

(The Court refused to permit the introduction of evidence of a map or drawing received by the witness from his father and in his father's handwriting and bearing upon the ground in controversy, which map is marked Exhibit "A".)

"The first I ever heard of the Grant Claim was in the fall of 1899. My father was on the ground with me in 1900."

(The Court refused to permit the witness to testify as to whether he had a deed of the claim

from his father or whether it stood in his father's name, and refused to permit the witness to testify that he had one-half interest in the property.)

"I sold the claim in the spring of 1902 for my father to D. W. McKay."

(The Court refused to permit the witness to testify as to where he claimed that Moonlight No. 1 Claim lay during the time he was an owner, and refused to permit him to give its direction from Moonlight Springs.)

(The Court also refused to permit the witness to testify that during the time he was an owner he never conflicted with the Grant Claim.)

(The Court refused to permit proof of fact that during the time he was an owner of an equitable half interest in the claim of No. 1 Bench from 1900 to 1902 that he never knew that it conflicted in any way with the Grant Claim.)

"Up to the time I sold to McKay in 1902 I never heard of any claim between the Grant Claim and Bench No. 2 off Moonlight."

(The Court refused to permit the introduction of a letter dated Sept. 12, 1910, written by the witness to his father.)

(The Court refused to permit the witness to introduce as evidence letter dated April 11, 1911, from the witness to Mr. Gilmore.)

M. D. McCumber.

(Trans. pages 713-735.)

"I am one of the defendants in the case. I know the Grant Claim and have done work and caused

work to be done on the Grant Claim in the years of 1908-09-10 and 1911. The first work I did was in 1908 under a contract with Fox and Hersey. They sunk a shaft about 18 feet from the southwest corner of the ground in controversy in this action, and they continued to work on the claim until the spring of 1909 and I paid them for the work. I had a written lease from the Pacific Coal & Transportation Company, and I caused further work to be done in the fall and winter of 1909.

"Meyer and Pelitsch had a sub-lease on the 150 feet of the southwest corner and they sunk several shafts. They placed a cabin on the Grant Claim at my request, a red cabin, which stands there at the present time, and that cabin has never been moved from the time it was placed there in November, 1909, until the present time. Meyer and his associates sunk several shafts for me in the southwest corner and they averaged from 11 to 16 feet in depth. In the spring of 1910 between January and May, there was a great deal of work done in the southwest corner of the Grant Claim. The work was done by Meyer, Miller, Hanson, Kern and the Russians and one or two other men, whose names I cannot recall. In the spring of 1910 they dug two shafts in the southwest corner within the ground in controversy. The first was 27 feet deep, and the second 34 feet, and they used three boilers and four pumps, and the machinery was visible to anyone passing across the ground in that vicinity. They ceased work about the last days of April to my

recollection. It was about breakup time, and it was not practical to continue the work which they were doing at that time. After the machinery was moved, I had Mr. Meyer timber the shaft for protection, so that we could continue the following fall. To my knowledge pay was struck in these shafts.

"Mr. Allison Bruner was the agent of the Pacific Coal & Transportation Company looking after the ground during the summer and fall of 1910, and I arranged with him that I could cease operations until November, 1910, and I made arrangements to resume work on the first of November, 1910.

"I sent Adolph Meyer out to the ground on the 27th day of October, 1910, and he remained on the claim representing me all that winter and the next spring. I believe it was April 30, 1911, when he ceased. J. W. Charles succeeded him."

(The Court refused to permit the witness to testify that Adolph Meyer represented him on the ground until the 1st of May, 1911, and J. W. Charles lived in the red cabin on the ground in controversy until the 7th day of July, and Captain George Smith has lived on the ground ever since and is now living there.)

"I had a conversation with Louis Stevenson in November, 1910, in the postoffice in Nome with reference to the ground in controversy, and I told him what I was contemplating doing on the ground. I fixed the date because I was a little suspicious, and I had my lease from the Pacific Coal & Transportation Company recorded the 1st day of November.

The work that I caused to be done in 1908 and 1909 by Hersey and Fox was of the value of one hundred (100) dollars."

(The Court refused to permit the witness to testify as to what was the value of the work between the 30th of November, 1909, and November 7th, 1910, the time of the institution of the suit.)

"I spent eighteen hundred (1800) dollars for labor, supplies, materials and other things upon the ground in controversy between the 30th day of November, 1909, and the 7th day of November, 1910."

(The Court refused to permit the witness to testify that the Pioneer Mining Company attempted to buy his title to the ground in controversy prior to the institution of the suit.)

We have called attention to the evidence on the question of adverse possession introduced by defendants more at length than is usually justified in a brief, inasmuch as we feel perfectly certain that the lower Court must have ignored all of this testimony in finding against the defendants on the question of possession. The lower Court was of the opinion that the long established adverse possession of defendants was of no avail while defendants were holding title in subordination to the title of the United States Government.

It cannot be possible that the lower Court thought that all of the witnesses whose testimony we have summarized were not telling the truth, and therefore we are forced to the conclusion that the Court believed that no amount of testimony under the facts of the case could show adverse possession in defendants.

DOES THE TESTIMONY OF PLAINTIFF SHOW THAT THE ADVERSE POSSESSION OF DEFENDANTS WAS INTERRUPTED?

The question involved is as to whether the alleged acts of plaintiff which he claims amount to a possession of the ground on his part were such acts as would show a manifest intent to use the ground for the purpose for which it was located. We have the clear situation of defendants and their predecessors in interest, using the claim and especially the conflict portion thereof for a period of ten (10) years for mining purposes. The best that can be claimed for the testimony of plaintiff is that it shows that the plaintiff was using the ground simply for the purpose of an easement for ditch, pipe lines and pen-stocks.

This user by plaintiff can not amount to the dignity of a possession such as the law indicates is necessary to interrupt defendants' adverse possession, especially in view of the fact that plaintiff at the same time was using in the same way other adjoining mining claims concerning which plaintiff makes absolutely no claim of title whatsoever. The

situation is made no better by the evidence that each year since the construction of the penstocks, ditch and pipe lines, plaintiff expended from $800 to $1200 in repairs and improvements and cleaning the pipe lines upon the ground in controversy.

The evidence shows clearly that plaintiff spent about the same sums of money in repairs and improvements and cleaning of pipe lines upon other ground and claims, which plaintiff did not assume to own but over which presumably plaintiff had some kind of an easement. (Trans. p. 253.) (Trans. p. 256.) In view of the peculiar attributes which appertain to mining ground; and in view of the fact that defendants, as will be shown later, had a clear legal right to quiet title to their ground by adverse possession, while at the same time, admitting paramount title in the U. S. Government; and in view of the fact that an easement might have been secured by plaintiff from the Government for pipe lines or railroads over the land in controversy we submit that the testimony of plaintiff in this regard does not show adverse possession in plaintiff, nor does it interrupt in any way the adverse possession of defendants.

It is next contended that the testimony of plaintiff shows that from the 12th of May to the 27th of October, 1910, defendants were not in the actual possession or engaged in mining upon the Grant Claim, and especially on the ground in controversy, and that during said time plaintiff carried on ex-

tensive mining operations on the claim by hydraulic process, and that on the 7th day of November, 1910, the date of the commencement of the action, two employees of the plaintiff were engaged in mining upon the claim (Trans. p. 98). This is the only serious interruption of the possession of defendants which so far as we are advised plaintiff asserts. It will be observed that the testimony of defendants shows that from the time of the location of the claim January 9, 1899, until the 12th of May, 1910, defendants' possession was not disturbed. The testimony on the part of defendants which we have already called attention to shows that although work was not being actually done during the time specified by plaintiff work was in contemplation and preparations were being made to resume work, and McCumber, the lessee, had permission of the agent of the Pacific Coal & Transportation Company to cease work for the period until November 1, 1910, the reason therefor being clearly given (Trans. p. 716).

Let us concede for the sake of the argument merely, that plaintiff did interrupt defendants' adverse possession of the ground on the 12th of May, 1910. The learned Judge of the Court below on page 98 of the transcript, in summing up the testimony which seemed to the Court to show that the defendants' possession was interrupted, closes the summary with the statement which we have heretofore made under this head of our argument.

We submit, however, that if it be conceded that defendants' possession was interrupted, adverse and notorious and under color and claim of title for seven years prior to the 12th day of May, 1910, then defendants would be conclusively presumed to have acquired title by prescription and the interruption on the said date, if such interruption took place, could not in fact deprive defendants of their acquired possessory title.

It is obvious to counsel for the defendants who are studying this case with the evidence before them, and with the advantages that come from a birds-eye view of the situation, that the learned Court below and the counsel who tried the case for plaintiff were of the opinion that a title could not be acquired by a subsequent locator as against a prior locator, by adverse possession for the seven-year period, and that it was absolutely necessary for defendants to hold physical possession of the claim for every day in the year and every hour of each day up to the date of the filing of the complaint herein.

Defendants were justified in proving, as they certainly did prove, that they had actual physical possession of the claim on the very day when the suit was brought. The obvious purpose of insisting upon this proof was in order that defendants might not be denied their constitutional right to a trial by jury and in order that they might show that the Court sitting as a Court of equity had no jurisdic-

tion to try the case upon the equity side of the Court. But so far as the question of adverse possession is concerned, defendants might well have rest content with showing that they had acquired a prescriptive title by adverse possession to the ground in controversy under color of right long before the plaintiff, spurred on by avarice after seeing the paystreak exposed, brought the suit at bar for the purpose of taking defendants' claim away from them.

We may well assume under this head of our argument that the Court below in summing up the testimony on the question of possession on page 98 of the transcript, draws conclusions most favorable to the plaintiff. The Court says:—

"Thus far there is no dispute."

Mr. Lindeberg was the president of the plaintiff corporation and notice his testimony upon this point (italics ours):

"Q. Did you ever do any mining whatever, within the boundaries of the disputed area?

"A. *Never any actual mining, no, sir.*

"Q. Have you at any time, you or the Pioneer Mining Company, been in possession of a solitary foot of the disputed area?

"A. I think we have always been in possession of the claim.

"Q. Now, tell the Court in what way you have been in possession of this disputed area, if you can?

"A. *We have had our pipe line across the claim; we have drilled across as we have practically run across all of our claims, crossing this ground.*

"Q. You have at the present time the same water pipes strung across the ground in conflict?

"A. Yes, sir.

"Q. On the same claim?

"Q. Don't all of the works that you have now cross on the (41) Moonlight Claim in the same way at the westerly end?

"A. Yes, sir.

"Q. On Moonlight?

"A. Yes, sir.

"Q. And on Bench No. 1 and the Winter fraction?

"A. Yes, sir.

"Q. And numerous other claims now owned by the Pioneer Mining Company and in that vicinity?

"A. Yes, sir.

"Q. And you have some pipes strung over the rest of the ground claimed in the same manner, the ownership claimed in the same manner, as the ground in conflict?

"A. Yes, sir.

"Q. So that you have the same possession of the whole of the Grant Claim that you claim to have of the ground in conflict?

"A. You could call it that."

Trans. pp. 252-253.

May we then conclude that the only testimony which in any way tends to disturb the years of

adverse possession proved by defendants is the testimony summed up by the learned Court? If this assumption be one that is justified from the transcript before us, then the conclusion is inevitable that the defendants acquired a prescriptive title by adverse possession under the Alaska statute to the ground in controversy long before the dormant plaintiff was stirred by the sight of the pay gravel into litiguous activity.

For the purposes of argument upon this branch of the case, we may throw out the testimony of Adolph Meyer which seems to be the only testimony of the defendants seriously disputed, and we submit most earnestly that the defendants are shown by all the evidence in the case to have had a perfect prescriptive title to the conflict area between the two claims, Moonlight Bench No. 1 and Grant Claim at the time of the filing of the complaint by plaintiff.

THE HOLES DRILLED BY DEFENDANTS.

It may be contended by the defendants that the plaintiff disturbed the possession of defendants by drilling holes upon the ground in controversy in 1907. The testimony of John Brower (Trans. pp. 256 to 263), and John Langstrom (Trans. pp. 263 to 269) shows that the defendants procured some holes to be drilled very close to the line between Moonlight or Lyng Claim and the west line of the Grant Claim. As we read this testimony and note

the very significant circumstance that the holes were drilled close to the western line of the Grant Claim and near the dam, we are compelled to conclude that the plaintiff through its manager, Mr. Stevenson, was trying to keep as close to the line as possible, and in fact, did not intend to go over the line at all.

If the plaintiff at that time was claiming to be the owner of the conflict area which is the subject of the dispute in this action, it is a coincidence rising to the dignity of a miracle as to why the holes were dug so close to the real line between Lyng's claim and the Grant Survey. We must remember at this point that plaintiff at the time of the drilling owned the Lyng Claim.

The witness John Brower was evidently an exceedingly hostile witness and did not care to know anything except the fact that he had drilled holes at the direction of Mr. Stevenson. He was forced to admit that there might have been men working on the Grant Claim at the time he drilled the holes, but he did not pay any attention to whether they were working there or not, and he knew nothing about any lines, but put the holes down where he was instructed.

The witness John Langstrom was also confined largely by the exigencies of the case to his testimony to the effect that he drilled the holes where he was told and did not know where the lines of the Grant Claim were. He had no orders from Mr.

Stevenson not to cross any particular line. He followed the line because Charley Johnson told him to, and he did not know how close the dam was to the line between the two claims.

We repeat that the fact that the holes were dug so close to the line indicates to our mind clearly that the plaintiff at that time recognized the line, and the plaintiff only stepped over the line later when he filed the complaint or just prior thereto.

Summing up then the testimony on the question of adverse possession of defendants, we believe that no serious dispute of fact is involved and that if we can show that under the facts and circumstances of this case a title can in any event be acquired by prescription, the case at bar makes out a clear title by prescription resting in defendants long prior to the commencement of this action.

> "Adverse possession, generally speaking, is a possession of another's land, which, when accompanied by certain acts and circumstances, will vest title in the possessor.
>
> "No matter in what jurisdiction the determination of what constitutes adverse possession may arise, the decisions and textbooks are unanimous in declaring that the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under a statute of limitations. * * *"
>
> Cyc., Vol. 1, p. 981.

> "Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it, and in taking the profits

of which it is susceptible. * * * It is ordinarily sufficient if the acts of ownership are of such a nature as a party would exercise over his own property and would not exercise over another's. Actuality of possession is a question compounded of law and fact, and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title, the character of the land, and the purpose to which it is adapted and for which it has been used. All these circumstances must be taken into consideration by the jury whose peculiar province it is to pass upon the question. * * *"

Cyc., Vol. 1, p. 984.

Nevada Sierra Oil Company v. Home Oil Company, 98 Fed. 673.

"One who is in the actual possession of a mining claim, working it for the mineral it contains and claiming it under the laws of the U. S., whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely or otherwise fraudulently intruded upon or ousted, while he is asleep in his cabin or temporarily passing from his claim."

"It is well settled that title to an unpatented mining claim may be acquired by adverse possession. This follows logically from the provisions of Rev. St. U. S. 910 (U. S. Comp. St. 1901, p. 679) requiring each mining case to be adjudged by the law of possession, regardless of the fact that the paramount title to the land is in the United States. Moreover, in Rev. St. U. S. 2332 (U. S. Comp. St. 1901, p. 1433) express provision is made that possession of a mining claim for the period of the state statute

of limitations 'shall be sufficient to establish a right to patent thereto * * * in the absence of any adverse claim', and despite some decisions to the contrary, it would seem to be clear that, even if there is an adverse claim, the law of possession shall govern. Twenty years' open occupation of a mining claim under color of title will entitle a plaintiff to enjoin a location of the same ground by defendant, even though no evidence is introduced to show the devolution of title from the original locator to the plaintiff. In most states it seems that a much shorter time will suffice."

Costigan on Mining, p. 524.

"What constitutes adverse possession of mining claims is the same as what constitutes it in other real property. Secret underground mining will not serve; but such open, continuous and exclusive acts of possession and of mining as the nature of the business and customs of the country call for will suffice. Where the estate in the minerals has been severed from that in the surface, adverse possession of the surface does not carry with it adverse possession of the minerals."

Page 525, Costigan Mining Laws.

SYLLABUS: Where a purchaser of mining claims has held them adversely for the period of limitation, it will be presumed against an adverse claimant that the claims were regularly located.

Buffalo Zinc & Copper Co. v. Crump, supra, 70 Ark. 525; 69 S. W. 572.

SYLLABUS: For when fee is once acquired by five years' adverse possession, it continues in possessor, till conveyed in the manner pre-

scribed in conveyance of title acquired in other modes, or till lost by another adverse possession of five years.

Cannon v. Stockman, 36 Cal. 535.

Webber v. Clarke, 74 Cal. 11.

SYLLABUS: This is a theory that adverse possession for period provided in statute operates to convey complete title to party as much so as any written conveyance. And such title is not only an interest in land, but it is one of highest character, absolute dominion over it, and appropriate mode of conveying it is by deed.

Kerr's Cyc., Vol. 3, p. 25.

We have now prepared the way for the discussion of the legal question which is directly presented under this head of our argument.

(b)

DEFENDANTS' TITLE BY PRESCRIPTION IS ESTABLISHED AS A LEGAL CONCLUSION FROM THE FACTS PROVED.

Section 1042 of the Alaska Code of Civil Procedure (Carter's Codes, p. 354) reads as follows:

> "The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto, except as against the United States."

Section 4 of the Alaska Code of Civil Procedure (Carter's Codes, p. 145) reads as follows:

> "The periods prescribed in section three of this act for the commencement of actions shall be as follows:

> "Within ten years actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action: Provided, in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act."

Because of the importance of the question discussed under this head of our brief, and because the learned judge of the lower Court in effect decided in the case at bar that a title can in no event be acquired by adverse possession by one in possession of public lands who holds in subordination to the United States Government (Trans. pp. 104-109), we shall examine the cases on both sides of the controversy, with a view to getting at the real principles involved.

> Tyee Consolidated Mining Co. v. Langstedt, 136 Fed. 124 (C. C. A., 9th Circuit Alaska, March 6, 1905).

The Court says in its opinion, at page 125:

> "The writ of error presents the question whether, in the territory of Alaska, adverse possession of a mining claim, as against the locator thereof, or his successors in interest, can be initiated at any time before the issuance

of a patent from the United States therefor * * *. It is well settled that the Statute of Limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title, and that an occupancy by another prior to that time will not be deemed adverse to the title of such grantee. But there is adversity of opinion as to the precise time when the title passes from the Government to an entryman upon the public lands.

"* * * In some Courts, it has been held that the title passes to such an entryman as soon as he has complied with all the conditions requisite to entitle him to a patent, and that at that point of time an adverse possession may have its inception.

"* * * The ruling of the Court below in holding that the possession of the defendant in error was adverse prior to the time of the issuance of the patent was based upon the consideration that the laws regulating the disposal of mineral land are essentially different from those that control the disposal of agricultural lands and confer upon the locator of a mineral claim an estate of such a nature as to render inapplicable thereto the doctrine that the Statute of Limitations begins to run only from the time of the issuance of the patent.

"It is true that the locator of a mineral claim has, prior to the issuance of the final receiver's receipt, a broader control over his claim, and a higher estate therein than an entryman of agricultural land. But after full compliance with all the conditions by which a patent is authorized to be issued, there is no perceptible difference in the two estates. In cases where the question has been presented for adjudication, the Courts have uniformly held that the Statute of Limitations does not begin

to run against the claimant of a mining claim before his patent issuance."

The fundamental doctrine of the case is very well stated in the syllabus, as follows:

> SYLLABUS: Since there could be no adverse possession of public land on which a mining claim was located while the title was in the United States, there was no disseisin sufficient to start the Statute of Limitations in operation, as against the locator of said claim, prior to the issuance of a government patent to him therefor.

In

> Tyee Consolidated Mining Co. v. Jennings, 137 Fed. 863 (C. C. A., 9th Cir. Alaska Div., May 1, 1905),

the same doctrine was announced and is found in the syllabus as follows:

> Adverse possession of a mining claim in the territory of Alaska, as against the locator or his successors in interest, cannot be instituted before the issuance of a patent therefor by the United States.

The sections of the Code of Civil Procedure for Alaska under consideration, to wit, Section 1042 (Carter's Codes of Alaska, page 354), and Section 4 of the same code (Carter's Codes, p. 146), were in effect a re-enactment of the same sections of the Code of Civil Procedure of the State of Oregon. By the act of Congress of May 17, 1884 (23 Statutes 24), and the act of June 6, 1900, the Code of Civil Procedure for Alaska was adopted and the

sections under review are almost identically the same as the similar sections in the laws of Oregon.

It is true that prior to the adoption, for Alaska, of the Oregon Code of Civil Procedure, the cases of Altschul v. O'Neill; Altschul v. Clark, and Beale v. Hite had been decided by the Supreme Court of Oregon. It would therefore seem to follow that so far as the District of Alaska is concerned, in adopting the Code of Civil Procedure of Oregon, the interpretation of these sections given by the Supreme Court of Oregon was adopted as the interpretation of the laws applicable to Alaska.

But after the decision in the three cases above specified, and after the incorporation of the Oregon law into the Alaska Code, the case of Boe v. Arnold (102 Pacific Reporter 290) came before the Supreme Court of Oregon on the first day of June, 1909, for decision, and we contend that the decision in the case flatfootedly overruled the three previous decisions of the Supreme Court of Oregon.

There is no doubt but that the Circuit Court of Appeals for the 9th Circuit, in the interpretation of the Alaska Code, considered itself more or less bound to a great extent by the interpretation which had been put upon the code by the Supreme Court of Oregon.

We are strengthened in this view when we consider the case of Eastern Oregon Land Company v. Brosnam et al., C. C. A. (9th Circuit, September 7, 1909) 173 Fed. 67, where as we shall see, the said Circuit Court of Appeals adopts the decision of

Boe v. Arnold and by implication overrules the two Tyee cases.

We shall now consider the case of

Boe v. Arnold, supra.

The facts of the case show that the defendant and his grantors claimed title and settled upon the land in question in 1881 and resided thereon continuously under the homestead laws until 1893, when plaintiff filed his application for homestead. It also appears that from the date of his settlement until his death, Chandler, from whom the defendant claimed title, was in open, notorious, exclusive and adverse possession of the land, living upon it, improving and cultivating it and claiming it adversely to everyone except the United States.

It also appears that the plaintiff claimed title by virtue of a grant under which "there be and is " hereby granted alternate sections of public land " designated by odd numbers, three sections per " mile to be selected within six miles of said road".

The learned Court in writing its opinion reviews exhaustively the Oregon cases of Altschul v. O'Neill; Altschul v. Clark, and Beale v. Hite, and also cases from Texas and Missouri and California, and in the course of the opinion says:

> "It is true that limitation will not run when the land is vacated, and title remains in the State, but such is not the case here, and we can perceive no good reason why one in possession of land under the mistaken belief that it is va-

cant, asserting an exclusive and adverse claim, having the exclusive use and enjoyment of it under a claim that it is hostile to the true owner, may not rely upon such possession in order to prescribe under the 10-year statute.

* * * * * * *

"In view of the authorities here cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to land by adverse possession for a period of 10 years as against all persons, should recognize the superior title of the United States Government, and seeking in good faith to quiet that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant. Holding these views, we are of the opinion that the judgment of the Court below should be affirmed; and it is so ordered."

We now find that the Circuit Court of Appeals for the Ninth Circuit follows Boe v. Arnold and in effect overrules both the Tyee cases as follows:

Eastern Oregon Land Company v. Brosnan et al., Circuit Court of Appeals, Ninth Circuit (Oregon Sept. 7, 1909), 173 Fed. Rep. 67.

"It is conceded that in each case the sole question arose out of the plea of the statute of limitations, which was sustained in the Court below. While the evidence went to show that in each case the defendants and their predecessors in interest held adversely to the plaintiff for the statutory period, it is stipulated that they did not hold against the government of the United States, but, on the contrary, during such possession, sought title to the land from the government.

"It does not seem to be questioned, certainly the general rule is well settled, that adverse possession of land, though held in admitted subordination to the title of the government, may nevertheless be adverse.

"It is true that at the time of the filing of the brief of the defendant in error, and at the time of the oral argument of these causes, the cases of Beale v. Hite, Altschul v. O'Neill and Altschul v. Clark, stood as the law of Oregon in respect to the character of adverse possession required by the Oregon statute; but by the very recent decision of the Supreme Court of that state made in the case of Boe v. Arnold (decided June 1, 1909), 102 Pac. 290, the previous cases of Beale v. Hite, Altschul v. O'Neill, and Altschul v. Clark were expressly overruled—the Court concluding its opinion in these words:

"'In view of the authorities cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to the land by adverse possession for a period of 10 years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant.'

"This leaves the general rule above alluded to applicable to the present cases, with the necessary result, in view of the record, that the judgment in each case must be affirmed.

"Ordered accordingly."

We readily concede that an early case decided by the Supreme Court of the United States is contra, as follows:

Redfield v. Parks, 132 U. S. 244 (Arkansas 1889).

The doctrine of this case is that the United States is not affected by the Statute of Limitations of any State, and hence title by adverse possession under the laws of any state cannot commence upon public lands against anyone who claims title until patent has been issued by the Government to the owner.

But the doctrine of this case has been very much amended if not overruled by the two cases of Iowa Railroad Land Company v. Blumer, 206 U. S. 482 and Missouri Land Company v. Weise, 208 U. S. 234.

The doctrine of the case of Iowa Railroad Land Company v. Blumer, supra, is that a title by adverse possession held by one who occupies the premises under color of title will run against a railway company which has complied with all the terms and conditions of a Congressional Land Grant as fixed by Congress after the acceptance of the grant by the State, even though there is a lack of final certification and issue of patent.

The Court says:

> "We think the record discloses that for more than 10 years required by the Iowa statute to ripen said title, Carraher was in possession of the premises. He had planted a large number of trees; caused the lands to be cultivated; raised crops; had rented the lands to others and was understood to be claiming the ownership. The answer of plaintiff in error to this claim of

> title is that Carraher was not in possession of the premises claiming title in good faith."

We submit that this is quite a serious qualification of the doctrine set forth in Redfield v. Parks, supra, and shows the tendency of the Courts to give a more liberal construction, which will enable a person in good faith to acquire a title by adverse possession.

We contend that there was a further qualification of the rule that adverse possession could not commence upon public lands until the issuance of a patent to one against whom the adverse possession is claimed, in the case of Missouri Valley Land Company v. Weise (Neb. 1908), 208 U. S. 234. The doctrine of this case is that where a grant had been made under the terms of which title was to pass to the railway company upon the filing of a map of definite location in aid of a branch railroad which road was not in existence at the time of the passage of the act constituting the grant and amendment therefor, was nevertheless a grant in impraesenti, such as would start in operation adverse possession.

The Court said at the close of its long opinion upon this case as follows:

> "We are clearly of the opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term and the acts of Weise in seeking to quiet title from the U. S. under the Act of 1887 with the view of removing a cloud upon his title was not an act of recognition or acknowledgment of a superior title, either in the United States or in the Sioux City

> Company operating to interrupt the continuity of his adverse possession and in any event, cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for quieting the legal title to the land by adverse possession."

We submit that the Supreme Court has made a large step in advance in giving liberal construction to the laws with a view to permitting the acquisition of title by adverse possession and we feel confident that the Circuit Court of Appeals for the 9th Circuit was fully justified in repealing the harsh and narrow rule of the older Oregon cases and the Tyee cases and adopting the liberal and rational rule of the Eastern Oregon Land Company v. Simpson (supra).

We may see by analogy how the Supreme Court has viewed in a much more liberal fashion the right of a locator on mineral ground to recover title as against a prior locator.

In the case of Farrell v. Lockhart, 210 U. S. 142 (Utah 1908), the Supreme Court held, to quote from the syllabus:

> That the ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing actual labor, if at the time when the second location is made, there has been an actual abandonment of the claim by the first locator.

In rendering the opinion in this case, the Court says:

> "When it was found by the trial Court that the evidence offered tended to show that the South Mountain Lode Claim was located in August, 1900, *and that no work was ever done on said claim,* * * * Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory forfeiture of the South Mountain would have resulted. * * * to the contrary we are of the opinion that the proof that was so offered on behalf of the Divide tendered unexplained to show that the location of the South Mountain was not made in good faith and that the claim had actually been abandoned when Farrell made his location."

We have cited this case by analogy to show how far the Supreme Court has gone in deciding in favor of a bona fide location as against a prior locator, who has abandoned his claim, even though the strict statutory period during which assessment work could be done had not yet passed at the time of the subsequent location.

> Fuller v. Fletcher et al., 44 Fed. Rep. 34 (Rhode Island 1890).
>
> "But such an instruction would be entirely inconsistent with the opinion of the Supreme Court in which it was distinctly affirmed that, when the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant within a period short of the Statute of Limitations; and also that when

a proprietary right has long been exercised, although the exclusive possession of the whole property to which the right is asserted may have been occasionally interrupted yet if the actual possession has been accompanied by other open acts of ownership and the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead."

120 U. S. 550, 552; 7 Sup. Ct. Rep. 667.

In concluding then this branch of our argument, are we not justified in saying that defendants could not possibly have had a fair and impartial trial upon the important question of their prescriptive title when it is demonstrated that the Court who tried the case was in error concerning the principle of law herein discussed? If any amount or kind of evidence could establish a prescriptive title, defendants respectfully submit that such a title has been proved in the case at bar. Shall they be deprived of valuable property to which they have such a title by the error of the trial Court?

V.

A FOREIGN CORPORATION UNDER THE LAWS OF ALASKA HAS A CLEAR RIGHT TO PLEAD THE STATUTE OF LIMITATIONS AND TO ESTABLISH A PRESCRIPTIVE TITLE TO MINING PROPERTY.

The case of Winne v. S. W. Co. (Iowa), 18 L. R. A. 524, relied upon by plaintiff in the Court below,

shows that the doctrine enunciated in that case, and in the New York cases cited therein, is based upon a special statute in each state inhibiting or denying the right of the plea to a foreign corporation not complying with the law.

There is no such statute in Alaska. The note reviewing the cases on the subject, found with the principal case, 18 L. R. A. 524, distinguishes the principle.

There was cited in the Court below, Sec. 15, page 147 of the code, but the very case cited by the code thereunder, Anderson v. Baxter, 4 Ore. 111, distinguishes the difference in actions *in personam* and *in rem*.

By the Alaska code it is expressly provided in Section 227, page 402, chapter 23, that service may be had upon a foreign corporation by publication, this being one of the two methods of bringing the corporation into Court. See

U. S. Express Co. v. Ware, 87 U. S. 20;
Kieffer v. Victor L. Co., 98 Pac. 877;
Arndt v. Griggs, 134 U. S. 316.

Section 366, page 225 of the code provides that upon death or removal of the statutory agent it is the duty of the clerk of the court to notify the corporation of such death or removal, and it is admitted in the evidence in this case that the defendant, Pacific Coal & Transportation Company had regularly appointed agents at Nome, and so far as the

record shows, no notice was ever given to the defendant of the death or removal of such agents.

Unless there can be shown some special statute governing Alaska, denying a foreign corporation within the District of Alaska the right to plead the Statute of Limitations then we contend that a foreign corporation has the same right to all defenses in Alaska as any other person may have, and no distinction is made under the law.

The only penalty for failure of a foreign corporation to comply with the law is a fine of twenty-five dollars per day and this could only be collected by the Government after the Government had notified the foreign corporation according to law, and we do not think plaintiff can produce any authority under wording of the Alaska code denying a foreign corporation any right which is given to a domestic corporation or an individual in setting up and maintaining any and all defense allowed under the law.

VI.

IT IS SHOWN BY THE EVIDENCE THAT THE PLAINTIFF WAS GUILTY OF LACHES TO SUCH A DEGREE AS IN EQUITY SHOULD BAR IT FROM ASSERTION OF TITLE TO THE GROUND IN CONTROVERSY.

The discussion of this proposition involves an examination of the other side of the question discussed under our title of adverse possession. In

order that the distinction may be apparent, we may state it this way. Under the title of adverse possession we have shown that defendants and their predecessors in interest have acquired title to the ground in controversy by positive and affirmative physical acts of possession. Under the title of laches we shall show that the plaintiff forfeited whatever title it might have acquired by reason of Jensen's location made January 3, 1899, through its failure to perform any of the many acts which would be evidence of its intention to claim the land in controversy. In other words, we propose to show that during the entire period while defendants were in the actual physical possession of the claim, plaintiff and its predecessors in interest pursued such a negative attitude with respect to the claim on their part as is tantamount in equity to an abandonment by them of whatever right they might originally have had over the conflict area of the claim.

If we were to sum up the facts upon which this proposition of law which we are about to discuss is based, it would require a re-statement of all the evidence to which we have thus far called attention in the brief. It seems to be admitted that the only acts of ownership performed by plaintiff and its predecessors in interest during the long period beginning with the original location of the ground and ending with the filing of the suit herein, were such few acts as we have already specified, that is:

(a) The drilling of the holes, near the line in 1905;

(b) Pipe lines, penstocks and ditch;

(c) The mining operations carried on by plaintiff in 1910.

Of course, if we concede that plaintiff during all this time was in possession of the claim in controversy then the defense of laches would indeed fail. The learned Judge of the Court below as we view the case has fallen into the difficulty of reasoning in a circle somewhat in this fashion.

Since defendants could not in any event acquire title by adverse possession, because they were holding in subordination to the Government of the United States, therefore, defendants as a question of fact, must be considered as not having been in possession of the claim during all the years covered by the case.

Since defendants were not in possession, plaintiff is found to have been in possession and therefore plaintiff owed the defendants no duty whatsoever, and hence the defense of laches could not possibly arise in the case.

The mere mining operations of plaintiff in 1910 when plaintiff took possession of the ground in controversy ought not to justify us in saying that plaintiff was in possession of the ground during the time he is charged with laches and that therefore the defense of laches is not available.

The evidence of possession by defendants which we have heretofore in this brief summarized would seem to indicate that at all times during which defendants and their predecessors in interest were performing the acts of possession, the plaintiff was by its purely negative attitude building up the defense of laches which defendants are now seeking to avail themselves of.

In order that defendants might acquire a title by adverse possession it is necessary for them to show that they have kept and retained open, notorious and uninterrupted possession of the ground in controversy for the statutory period required by the Code of Alaska.

Under the defense of laches, it would have been possible for defendants to have acquired an equitable possessory title by showing the same acts of adverse possession for a less period than the statutory period of limitation, providing it was shown that the plaintiff failed to assert its right when it was in duty bound so to do. And in this regard we must always remember that the ground in controversy was mining ground and that plaintiff in order to hold it, was compelled to do assessment work each year.

There were many acts which plaintiff might have performed evidencing its determination upon its part to assert its title to the ground, but the record fails to show that any of these things were done, but on the other hand, the record does show in

effect that plaintiff had abandoned the ground in controversy.

> "Laches in a general sense is the neglect to do what in law should have been done for an unreasonable and unexplained length of time under circumstances permitting diligence. More specifically it is inexcusable delay in asserting a right. Strictly speaking laches implies something more than mere lapse of time. It requires some actual or presumable change of circumstances rendering it inequitable to grant relief."
>
> Cyc. 16, p. 152.

The change of circumstances shown by the evidence in this case is that defendants and their predecessors in interest and the defendant lessee, McCumber, changed their circumstances to the extent of putting improvements on the property and doing work which involved the expenditure of money, while plaintiff did absolutely nothing, except the meager acts to which we have called attention.

> "While the Courts have thus discussed the effect of delay alone, unattended by other circumstances, it is quite evident that there can be few, if any cases where there has been considerable delay, which present absolutely no other circumstances that might affect the question."
>
> Cyc., Vol. 16, p. 153.

How much stronger then, is a case which presents this situation; the defendants are shown to have held adverse possession to the property in controversy for a period of over three years in excess of the statutory period of limitation.

"While it is said that lapse of time, uninfluenced by a Statute of Limitation will not bar the divestiture of a legal title in favor of the equitable owner, long adverse possession operates as a bar to the assertion of title in equity as well as at law."

Cyc., Vol. 16, p. 154.

"The speculative character of the property involved is an important element in considering the effect of delay in assuming a right thereto, and more than ordinary promptness must be displayed to avoid the charge of laches in such case. This is but one phase of a broader principle that one may not withhold his claim awaiting the outcome of an enterprise and then after a decided turn has taken place, assert or renounce his interest in accordance with the result."

Cyc., Vol. 161.

"The most frequent case of laches consisting of delay working prejudice to defendants through change in circumstances is where plaintiff has slept on his rights and permitted defendants to make valuable improvements on the property in controversy or to make large expenditures in reliance on his title thereto."

Cyc., Vol. 16, p. 162.

Sage v. Winona & St. P. R. Co. et al. (Circuit Court of Appeals, Oct. 2, 1893), 58 Fed. Rep. 293.

"There are obvious reasons why the holder of the legal and equitable title to lands, who is in possession of the same, should not be confronted with the plea of laches when he files a bill to cancel some void or invalid conveyance

which operates as a cloud upon his title. Possession of the premises by the true owner is good and sufficient notice to the world of his rights therein, by reason of which third parties need not be prejudiced by any dealings they may have with the holder of the invalid conveyance, while the existence of the cloud is a continuing injury like a public nuisance. Under such circumstances, no harm can result in holding that no period of delay on the part of the owner in asserting his right to have the cloud removed will bar him of his remedy. But the case is far different when the person filing such a bill is out of possession, or, if not in actual possession, is the holder of a record title that is without any apparent flaw or defect. In such cases the doctrine that neither laches nor statutes of limitation can be invoked as a defense to a bill filed to remove a cloud upon a title has no just application, and, if tolerated, would frequently lead to gross injustice."

We shall continue the discussion of this phase of defendants' case under the head of estoppel.

VII.

PLAINTIFF WAS CLOSELY ESTOPPED BY ITS OWN ACTS FROM CLAIMING TITLE TO THE GROUND IN CONTROVERSY.

The facts so far as this portion of the brief is concerned are pleaded quite fully in the 7th affirmative defense found in the answer of both the defendants. The lower Court refused to admit the testimony offered in proof of the defense of estoppel, but for the purpose of discussion of the

question, we shall assume that the proof was accepted. In other words, we shall discuss the errors of the Court in this regard by grouping the errors under this one subdivision of our brief.

The particular errors complained of are found in Assignment of Errors Nos. 29, 30, 33, 34, 44, 45, 46, 47, 50 and 51. From the pleadings, and we refer to the pleadings in order that the facts may be presented in the shortest possible way, we find that three men, Lindeberg, Brynetson and Lindblom, were and are the real owners of the Pioneer Mining Company and also were the owners of the Moonlight Springs Water Company. The Moonlight Springs Water Company was during the year 1903 the owner of the mining claim known as the Moonlight Claim and also referred to in this brief and in the transcript as the Lyng Claim.

The Lyng Claim adjoins the Grant Claim on the west. The Moonlight Springs Water Company was engaged in selling water to the town of Nome conveying the same from a natural spring on said claim and near to the west side of the claim of defendants.

On the 18th day of May, 1903, the Moonlight Springs Water Company composed of substantially the same men who owned the Pioneer Mining Company brought a suit against George Doverspike, C. T. Howard, Crawford and Williams, who as the evidence shows were the lessees of the Pacific Coal & Transportation Company under a written lease

executed in the fall of 1902, which lease was upon the land and premises known as the Grant Claim.

It appears from the allegations of the complaint that the said lessees were working and mining the Grant Claim and extracting gold therefrom, and they were working the westerly part of said claim, near the easterly end of the Moonlight Claim and within the boundaries of the ground in controversy. The purpose of the suit brought by the Moonlight Springs Water Company was to enjoin the said lessees from carrying on their mining operations on the ground for the reasons alleged, that the said lessees were fouling the waters of the Moonlight Springs, the source from which the Moonlight Water Company obtained its supply of water for Nome.

It appears that an answer was filed by lessees setting up title of the Pacific Coal & Transportation Company to the land in controversy and setting forth the lease.

A temporary restraining order was issued on behalf of the plaintiff in the action and against the lessees but subsequently on a hearing on the merits, the injunction was dissolved. Thereafter, the lessees brought an action against the said Lindeberg, Lindblom and Brynetson. The action was tried and on the 17th day of April, 1899, a judgment was obtained against the defendants for the sum of $2500 and the judgment was paid in the month of October, 1909.

During all the time that this litigation was pending, the said persons constituting the Pioneer Mining Company never asserted any claim or title to the land in controversy, and never claimed or asserted ownership, possession or title thereto, but during all the time indirectly recognized defendant, the Pacific Coal & Transportation Company and its lessees as being the owners in possession and entitled to the possession of said lands.

Transcript, pages 36 to 42.

These facts constitute one line of estoppel in pais which the defendants were prevented under the rulings of the Court from proving. In a few words the situation is this: The same gentlemen who are practically the Pioneer Mining Company are also practically the Moonlight Water Company. Certain persons are working the ground in controversy in this action, and indirectly thereby fouling the springs on the property of these men.

They bring a suit to enjoin the miners from fouling their springs. Here was a splendid chance to assert and prove their ownership to the ground in controversy, and equity would seem to require them at that time to assert their title. We find that upon the other hand they do not bring an action in ejectment; that they do not succeed in enjoining the men who are working upon what they now claim to be their own ground; but upon the other hand, we do find that a judgment goes against them for damages.

It is the merest sham to contend that the corporation plaintiff is a different corporation from the Moonlight Springs Water Company, and hence that the Moonlight Springs Water Company was not bound to assert a title, which it did not technically have. Equity will look through the form of the transaction. We find that the plaintiff should have asserted its title to the ground when all of its stockholders knew that such an assertion of title would have prevented the mining operations which produced the alleged fouling of the springs.

The knowledge of the three men as to the facts was the knowledge of both the corporations because the same men owned both corporations. If they owned the ground on which the mining was taking place why did they not stop the trespassing and thus protect their springs in the most effective way? Were not the lessees and owners of the ground in conflict misled by the acts of plaintiff in not asserting its title to the ground when it should have done so?

WE NOW TAKE UP SOME OTHER LINES OF ESTOPPEL IN PAIS AS PRESENTED BY THE ASSIGNMENT OF ERRORS.

ASSIGNMENT OF ERROR NO. 33.

We contend that the Court erred in not permitting the witness Tom D. Jensen to testify that he had an interest in Claim No. 1 Bench Moonlight claimed by the plaintiff in this action.

The Court refused to permit the witness Tom D. Jensen to testify that he was an owner of an equitable interest to the extent of one-half of the Moonlight Claim under a special arrangement with his father who was the locator of the said claim. The facts show that when the deed was passed from the elder Jensen to his grantee, Tom Jensen acted as attorney in fact and executed the instrument (Trans. p. 236). If it were true that Tom Jensen was an equitable owner of a one-half interest, then that fact was very pertinent to the issues in the case. Our contention is that Tom Jensen as equitable owner of a one-half interest in the Moonlight Claim stood by with full knowledge of the facts, and never contended in any way that the Grant Claim conflicted with the Moonlight Claim. We must remember that the elder Jensen was not produced as a witness in the case, except by deposition and that the defendants had no opportunity for a thorough cross-examination.

Tom Jensen, the son of the elder Jensen, who was attorney in fact, is not permitted to testify that he, as the owner of a one-half interest in the claim, never contended that there was a conflict between the Moonlight Claim and the Grant Location. We submit that this serious error of the Court prevented defendants from proving the details of this particular line of estoppel.

ASSIGNMENT OF ERROR NO. 50.

The Court refused to permit the witness M. D. McCumber to testify that the plaintiff tried to buy his title to the ground in controversy prior to the institution of the suit. We are at a loss to understand why this testimony under the pleadings in the case and the issues as defined was not pertinent and proper. This is not a case where the Court is refusing to permit parties litigant to offer testimony as to a proposed compromise of their litigation. McCumber was a lessee in possession of the ground in controversy under a written lease from the corporation defendant. The plaintiff offers to buy out his title. If that is a fact and could be shown to be a fact, we submit that it is very important evidence going to prove and support a distinct line of estoppel in pais as against the plaintiff.

The error of the lower Court is more serious when we remember that plaintiff brings this action upon the theory that it was in possession of the ground at the time of the commencement of the action; and that the defendants are prevented by the rulings of the Court from proving that prior to the 7th day of November, 1910, the plaintiff offered to buy from M. D. McCumber the ground in controversy.

> "If a person by his conduct induces another to believe in the existence of a particular state of facts and the other acts thereto to his prejudice, the former is estopped as against the latter to deny that that state of facts does in truth exist."
>
> Cyc., Vol. 16, p. 680.

"Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights, and fails to assert his title or right, he will be estopped afterward to assert it; but it must appear that it was his duty to speak and that his silence or passive conduct actually misled the other to his prejudice."

Cyc., Vol. 16, p. 761.

VIII.

WE SHALL NOW DISCUSS MOST OF THE REMAINING ASSIGNMENTS OF ERROR WHICH HAVE NOT ALREADY BEEN GROUPED UNDER THE PROPOSITIONS HERETOFORE CONTENDED FOR IN THIS BRIEF.

Assignment of Error No 6.

The Court refused to permit Jafet Lindeberg to testify as to why he did not proceed to get a patent on the Moonlight Claim. The Court also refused to permit him to testify on cross-examination as to whether or not he knew that if he applied for a patent he would have to litigate the question of adverse title in the U. S. Land Office. We are at a loss to understand why the lower Court in view of the pleadings in the case confined the testimony so far as defendants were concerned within such narrow limits. The procuring of a patent to the land in controversy by plaintiff would not only have been one of the methods of asserting ownership, but the procuring of the patent itself in the event

that no adverse ownership was asserted would have intercepted the running of the Statute of Limitations.

There is no evidence introduced showing the doing of actual assessment work upon the Moonlight Claim by plaintiff and the defendants are now prevented from showing out of the mouth of the president of the corporation plaintiff, that he did not proceed to get a patent to the ground in controversy, because the corporation would have been met by an adverse claim in the U. S. Land Office.

ASSIGNMENTS OF ERROR No. 7 AND No. 8.

The Court erred in not permitting defendants to show that the plaintiff was the owner of the Jerome Fraction. An examination of the map (defendants' Exhibit No. 9) will show that the Jerome Fraction lay immediately to the south of the Moonlight Claim. The obvious purpose of the question by defendants was to show that the mining operations carried on by plaintiff in or near the southwest corner of the Grant Claim, were in fact mining operations upon the Jerome Fraction, claimed by the plaintiff. One of the important facts in the case at bar is that the plaintiff owned mining ground both to the west and south of the ground in controversy. In view of the fact that plaintiff is contending that the holes drilled near the southwest line of the Grant Claim and the mining operations of 1910 were a disturbance of the adverse possession of de-

fendants, surely defendants should have been permitted to show that the plaintiff was in fact an owner of the ground surrounding the ground in controversy and that its mining operations were performed for the Jerome Fraction title and not for the title of the claim at bar.

The Court also refused as is shown by Assignment of Error No. 8 to permit Stevenson, the representative of the corporation plaintiff as a witness to testify on cross-examination as to whether or not he signed an affidavit swearing to the work that was done on the Jerome Fraction in 1903. Defendants proposed to prove that the work done near the line of the Grant Location, was in fact done for the Jerome Fraction.

We fail to understand why this is not pertinent and relevant testimony since the particular question under investigation was as to whether or not plaintiff had ever exercised any physical possession over the ground in controversy. We cannot reconcile this ruling with any other theory than that the lower Court was of the opinion that the question of adverse possession and the continuity of the possession and the interruption of the possession was a question entirely outside of the case, because the defendants were holding possession while recognizing the paramount title of the United States.

ASSIGNMENT OF ERROR NO. 9.

The Court refused to permit Mr. Stevenson, representative of the corporation plaintiff, to answer the question as to whether or not in 1909 the Pioneer Mining Company tried to buy the ground in controversy. We have already discussed the other side of this error when the Court refused to permit Mr. McCumber to testify to practically the same set of facts. It if were true that Stevenson, as the representative of the corporation plaintiff did try to buy the ground, we are utterly at a loss to understand why such an act by the plaintiff corporation would not be the strongest evidence of recognition by them of the fact that they did not own the ground in controversy.

We cannot but believe that the refusal of the lower Court to permit evidence of this character was seriously prejudicial to the defendants' side of the case and prevented defendants from having a fair and impartial trial.

ASSIGNMENT OF ERROR NO. 11.

The Court permitted the witness Arthur Gibson in testifying to the position of the stakes of the Moonlight Claim, to state what one, C. L. Spanggard, had told him concerning the stakes and corners of the claim.

In order that the seriousness of this error may be self-evident, we call particular attention to the

testimony of the witnesses, on pages 326-327 of the transcript as follows:

"Q. Old Willow Stake, state whether or not that was identified by anyone?"

(After objection to the question had been overruled and exception taken and allowed, the witness testified as follows:)

"A. Identified by Mr. Spanggard.

"Q. Identified as what?

"A. As the southwest corner stake of Bench No. 1.

"Q. Do you know Mr. C. L. Spanggard?

"A. I do.

"Q. State whether or not any of those stakes found at that point were identified by anyone as being the Bench No. 1 Moonlight Stakes, yes or no?

"A. Yes.

"Q. Who identified it and what did he identify it as?"

(Objection to this question was overruled and exception taken and allowed.)

"A. Mr. C. L. Spanggard said that one—"

(Here objection was made and the question restated.)

"Q. What did he identify the stake as; I don't care what he said, what did he identify them as?"

(Objection again made and overruled and exception taken.)

"A. As the corner of—the northeast corner of Bench No. 1 Moonlight.

"Q. Did he identify any other corner at that place, of any other claim?

"A. Yes."

We also call attention to certain excerpts from the evidence on page 328 of the transcript:

"Q. State whether or not that point was identified by anybody as a corner of Bench No. 1 Moonlight and if so by whom?

"A. *It was.*

"Q. By whom?"

(Objection made and overruled and exception taken.)

"A. By C. L. Spanggard.

"A. Mr. C. L. Spanggard identified it as the northwest corner of Bench No. 1 Moonlight."

On page 329 of the transcript we find more of this kind of evidence as follows:

"Q. Who identified it?"

(Objection made and overruled and exception taken.)

"A. Mr. C. L. Spanggard."

Even if we concede that under certain circumstances hearsay evidence of this kind might be admitted and we further concede that hearsay evidence under certain circumstances would not be prejudicial error, we earnestly contend that under the peculiar circumstances of this case, the admission of evidence of this character, where absolutely no chance is given to the defendants to cross-ex-

amine Mr. Spanggard, was most serious and prejudicial error.

Mr. Spanggard did not appear as a witness in the case. The facts show that he was one of the witnesses to both Jensen Locations (Trans. p. 227). The testimony shows that Mr. Grant was dead and could not be produced. Spanggard helped presumably to locate the Jensen Claim. Mr. Gibson was an exceedingly important witness in the case because it was the maps made by him which undoubtedly influenced the mind of the Court as to the location of the Moonlight Claim.

It was not contended that Mr. Gibson was present when either the Grant Claim or the Moonlight Claim or No. 6, Goodluck, were located. He therefore had no original knowledge as to the position of the boundary stakes except such knowledge as could be obtained from an examination of the stakes on the ground made years after they were placed.

Spanggard therefore who does not appear as a witness in the case. and whose testimony might or might not be of very serious importance to defendants speaks through the prejudiced mouth of Mr. Gibson, and the defendants are foreclosed of their right to cross-examine Spanggard concerning the statement which Mr. Gibson says that he made.

The fact that the word "identified" is used in the question put by the learned counsel for plaintiff, does not in any way cover up or conceal the

size of the error which has resulted so seriously in depriving defendants of their property.

When Spanggard, speaking through the mouth of Mr. Gibson, identifies the stakes which constitute the corners of the claim, he testifies that they are the stakes. Mr. Gibson said that Mr. Spanggard told him those were the stakes. Spanggard must have told him by the use of language symbols that they were the stakes. The process of identification was a process by which Spanggard either did or did not tell Gibson where the stakes were. If he told him, it is the clearest case on record of the worst kind of hearsay evidence, and every principle of law cries out against permitting a witness to testify through the mouth of another on an important issue of fact, such as on the question of locating these stakes. It is perfectly apparent to the Court that Mr. Gibson's map is made up to a great extent upon the basis of what Spanggard told him as to the location of the stakes.

We trust that we are not exaggerating the situation when we say that the most important foundation upon which the case of plaintiff rests is the testimony of Mr. Gibson who was at least so far as the record shows, a very hostile or adverse witness to the defendants. In fact, there is some suggestion in the record that Mr. Gibson was a highly partisan witness in behalf of plaintiff. Perhaps we should not at this point complain on that score, but at least we have the right to call attention to the fact that

if the testimony of Spanggard is to filter down to us through the testimony of Mr. Gibson, then indeed the defendants are placed in a position of very serious disadvantage. If Mr. Gibson had been a strictly impartial and unprejudiced witness, there might be some chance to suggest that the defendants were not injured by the method in which the testimony of Spanggard got into the record, but in view of the testimony of Mr. Gibson, the maps drawn by him and his excess of partisanship in the case, we submit that defendants have been deprived of a substantial right by the serious error of the Court in permitting Gibson to locate the stakes of the Moonlight Claim by the hand and with the mouth of the absent Spanggard.

We are curious to know what Mr. Spanggard might have said if upon the stand he was confronted with the Jensen Location on Bench No. 6 and the Jensen Location of the Moonlight Claim, and asked whether or not at the time, Jensen made his location, he was overlapping the Lyng Claim as the decree in the case at bar finds.

We might also like to have asked Mr. Spanggard as to what he knew about the lines of the Grant Claim, as well as the lines of the Moonlight Claim, but since we are deprived of the right of cross-examination, we submit that we were also deprived of a fair trial if this error of the Court is permitted to stand.

Assignment of Error No. 12.

The Court erred in permitting the plaintiff during the trial to so amend its complaint as to change its description of the Moonlight Claim. This is not the ordinary amendment where an erroneous description has been made, but this is an amendment which is permitted in order that plaintiff might locate its floating claim to fit in with the testimony of plaintiff and the alleged facts of the case.

The result of this amendment was to permit plaintiff to change its entire theory as to the location of the Moonlight Claim with the net result that the Moonlight Claim as fixed by this description, overlaps a portion of the Bob Lyng Claim. Defendants prepared their case for trial and tried it upon the theory that plaintiff was contending that the Moonlight Claim lay entirely to the east of the Lyng Claim.

Andrew Jensen had testified again and again that his location was to the east of the Lyng Claim, starting with the Lyng Claim as his initial stake (Trans. pp. 213, 214, 218). The amendment, therefore, came as a surprise to the defendants and should not have been permitted, because plaintiff must have known when suit was brought where this claim was located and the permission to change the description was not an amendment allowed for the mere purpose of correcting an error but the result of the amendment was that plaintiff was permitted to change its entire theory of the case.

Assignment of Error No. 14.

The Court would not permit the defendants to ask Mr. Gibson on cross-examination the question as to whether he ever made any other map or blue print of the ground in controversy except Exhibit A. Again we are at a loss to understand the theory upon which this ruling was made. As we have before stated, Gibson was a very important witness for the plaintiff. He was making out the lines of a claim, at the staking of which he was not present. He was making a map which seems to have been used largely as the basis of the decision, yet the defendants are deprived of the right to cross-examine him as to whether or not he had long previously made another map which might have conflicted with the map introduced in evidence.

For the same reason it would seem to have been a fair question put to Gibson as to whether or not it was a fact that the Lyng and Moonlight Claims (plaintiff's Exhibit A), were not identical with the same claims on another map. If the other map was made by Gibson, then the error becomes more apparent, but we ask the question as to why defendants were foreclosed from the right of cross-examination on these points.

Assignment of Errors No. 16 and No. 17.

When the witness, Arthur Gibson, was on the stand he was shown a map (defendants' Exhibit No. 7), and was asked if it was not a fact that the

Bob Lyng and Moonlight Claims on the exhibit were identical with the Bob Lyng and Moonlight Claims on a certain blue print (defendants' Exhibit No. 8 for identification), which defendants proposed to offer in evidence.

Counsel for defendants stated that he offered the blue print for the purpose of showing that so far as the Bob Lyng and Moonlight Claims were concerned the blue print was an exact copy of defendants' Exhibit No. 7. The Court refused to consider the testimony in that point and refused to admit the proposed blue print in evidence. In this regard we again call particular attention to the fact that the witness Arthur Gibson was adverse to defendants; that his surveys and maps seemed to the Court very important, and we submit that in so far as it was suggested that he had previously made a map for the Pioneer Mining Company showing the boundaries of the Bob Lyng Claim as they were set forth in the proposed blue print; that under these circumstances the widest latitude should have been given on cross-examination (Trans. p. 367).

Regarding Assignment of Errors No. 17 when the witness Dan A. Jones was upon the stand he testified that he made a certain map in November, 1911, showing Bench Claim No. 1, Grant Claim No. 2, East Fork, Whats Left Fraction and the line of the Moonlight or Lyng Claim; that they were all made from actual surveys by him and that the claims

were correctly depicted on the map with reference to each other. Defendants offered the said map in evidence, but the Court rejected the same and would not even permit the map to be offered in evidence for the purposes of illustration.

Trans. pp. 417-418.

The said map was marked for identification defendants' Exhibit No. 12. Jones testified that he was a civil engineer and U. S. Deputy Mineral Surveyor.

Trans. p. 393.

We confess again that we are at a loss to understand why a map made from an actual survey of the ground by the witness should not have been admitted in evidence even though certain claims on the map were made from a map sworn to by the witness Arthur Gibson and drawn from defendants' Exhibit No. 7.

It cannot be that Mr. Gibson's maps are the only ones that should be considered by the Court; nor does the record show such fairness and impartiality on the part of Mr. Gibson as to entitle his maps and surveys to pre-eminent consideration at the hands of the Court. For aught that appears Jones was as skillful in the matter of surveys as Gibson. We admit that it was within the province of the learned Judge of the Court below to believe Mr. Gibson and to refuse to believe Mr. Jones, but we cannot understand how the proper basis for such belief or

lack of belief could be laid by the defendants, unless they were permitted to present all of their evidence upon the question.

It should be repeated that Mr. Jones was testifying from actual surveys made upon the ground at least as to the claims which we have above specified, while as we have shown Mr. Gibson was testifying as to hearsay evidence concerning the location of the stakes. We submit that the failure to receive these two exhibits in evidence was a serious error prejudicial to the rights of the defendants.

Assignment of Error No. 31.

Under ordinary circumstances perhaps we should not have the right to object to the failure of the Court to receive in evidence a letter written by Tom D. Jensen March 28, 1911, to Mr. Gilmore, one of the attorneys for defendants.

We do not question in the least that the plaintiff could not be bound by a letter written by Tom Jensen to Mr. Gilmore which the plaintiff presumably never saw, and of which it did not know. In view of the facts however as clearly shown under our discussion of the refusal of the Court to grant a continuance for the purpose of taking the deposition of Andrew Jensen, we submit that the imposition on defendants of a technical and narrow rule, in view of the fact that they were denied the right to go into the contents of the letter on the cross-examination

of Andrew Jensen, has deprived the defendants of any chance which they may have had of combating the testimony of Andrew Jensen, under the strict rules of evidence.

ASSIGNMENT OF ERROR NO. 32.

The Court refused to permit the defendants to introduce in evidence defendants' Exhibit No. 51 (for identification). In the deposition of Tom D. Jensen he was shown a certain pencil sketch which he testified was to the best of his belief in the handwriting of his father as follows:

"Please examine the instrument I hand you, marked Exhibit 'A' at the top, and state if you know what that is.

"A. That is the drawing I received from my father. (Continuing): I received it in his letter, in that letter.

"Q. State whether or not, Tom, that is your father's handwriting.

"A. I think it is.

"Q. Are you familiar with his handwriting?

"A. Yes, I believe it is.

"Q. State whether or not that is the drawing enclosed in the letter received from him.

"A. It is.

"Q. State whether or not it was received by you in one of the letters you have previously testified to.

"A. It was."

Trans. p. 656.

The testimony while not absolutely conclusive tends to establish the fact that the pencil sketch was the handiwork of Andrew Jensen himself. The sketch therefore becomes a solemn statement in writing of the witness as to the location of his Moonlight Claim Bench No. 1. In fact an examination of the sketch shows that he calls it "My Bench on Moonlight" (Trans. p. 658).

Defendants do not contend that Andrew Jensen is a skilled surveyor or that his map shows accurately the positions of the various claims which we have read about in the transcript in the case, but the sketch does show and this is a significant circumstance that Andrew Jensen puts his claim to the south and east of the Grant Claim. It will be noticed from the sketch that he approximately locates Anvil Mountain and the Grant Claim below it while outside of the Grant Claim and away from the mountain, he places his claim. In other words he places his claim entirely to the east and south of the Lyng or Moonlight Claim and he also gives us the approximate position of the Moonlight springs (Exhibit No. 51 for Identification, Trans. p. 658).

Our contention is that while the location of these physical facts and of the claims is not absolutely correct, the relation which these various objects and the claims bear one to the other, as the picture existed at the time he drew the sketch in the mind of Andrew Jensen, is exceedingly significant and important.

It must be remembered that the decree in the case at bar following the amendment to the complaint, made over the objection of defendants, places the Jensen location in absolute conflict with the Lyng Claim and overlapping the eastern part of it.

Here we have a sketch drawn by the man who made the location which places his location outside of both the Grant Claim and the Lyng Claim and not in conflict with either of them. It is the theory of the defendants shown by such evidence as this, that the Jensen location was not accurately determined by Jensen himself and was more or less of a floating location intended to be placed upon any open ground that might lie between the eastern line of Lyng Claim and the western line of the Carlson Claim.

Here we have the locator himself (and a most important witness) presenting to the Court a pencil sketch substantiating defendants' theory in that regard, but defendants are deprived of the right to introduce the sketch in evidence and necessarily the defendants are deprived of the right to have the Court consider the same in rendering judgment in the case.

We submit that this was a most grievous error which closed the door upon defendants' case so far as the lower Court was concerned and prevented them from having a fair and impartial trial.

IX.

THE MOONLIGHT BENCH CLAIM NO. 1 AS ORIGINALLY LOCATED BY JENSEN, CONFLICTED WITH NEITHER THE GRANT LOCATION, NOR THE LYNG CLAIM, AND THE DECREE WHICH PLACES IT OVER BOTH THESE CLAIMS, IS UNSUPPORTED BY THE EVIDENCE.

Andrew Jensen was the locator of Moonlight Bench No. 1 and must have known the physical situation of the claim. He knew where the Bob Lyng Claim was located. He was a witness to the location of the Grant Claim (Trans. p. 228). Of all persons on earth he must have known whether or not his Moonlight Bench conflicted with either the Grant or the Lyng Claims. He testified directly and with specific reiterations that there was no conflict between his location and the Lyng Claim.

> "Q. Please state whether or not at all the times you were the owner of said Bench No. 1 Moonlight Claim you ever at any time claimed that the exterior boundaries of said Bench No. 1 Moonlight embraced or included any of the ground of the Bob Lyng or Moonlight Claim, or the said Grant Claim, as shown on Exhibit 'C' to this deposition.
> "A. I never did."
>
> Trans. p. 218.

> "Q. Did the Grant Claim at any time, to your knowledge, overlap the No. 1 Bench Moonlight, if so, state when you first discovered such overlap, and to what extent it overlapped?

"A. It did not to my knowledge. I never discovered it because I left in the fall of 1900."

Trans. p. 221.

"When I staked No. 1 Bench Moonlight, Robert Lyng's stakes on his Moonlight Claim were visible and the location stakes of the Nelson on the east. When I saw the stake on No. 6 Good Luck, Robert Lyng's on Moonlight were visible; I also saw the stakes of No. 1 Below on Anvil Creek belonging to Lindeberg. When the Grant Claim was staked, all the stakes of No. 6 below Good Luck and also the upper stakes of Robert Lyng's on Moonlight and the two upper states of Bench No. 1 on Moonlight owned by me were visible. At the time I staked Bench No. 1 Moonlight, as far as I remember there was six stakes marking the Moonlight or Bob Lyng's claim."

Trans. p. 224.

"At the time I staked my two claims No. 6 Good Luck and No. 1 Bench Moonlight, their exterior boundaries as marked by me on the ground, did not in any way conflict with the Bob Lyng or Moonlight Claim."

Trans. p. 214.

"My Bench Claim No. 1 Moonlight joined the Bob Lyng or Moonlight Claim on the east and extended along the easterly side of Robert Lyng's claim and further up towards Anvil Mountain than Lyng's claim, and it extended east from Lyng's claim towards the Nelson claim."

Trans. p. 213.

Furthermore the map (Defendants' Exhibit 51 for Identification) to which we have already referred, is a written admission by the witness Andrew Jensen to the effect that his original location did not overlap the Lyng Claim.

We must remember that there is a portion of the Grant Claim not in dispute in the action. But we do find that it is the portion of both the Grant and Jensen Claims, lying closest to the Lyng Claim about which the controversy turns. And yet notwithstanding the clear testimony of Jensen, we find the decree in the case at bar places the claim of plaintiff over and in direct conflict with the Lyng Claim.

Robert Lyng who made his location in November, 1898, and who testified that his east stakes had not been moved at the time he gave his deposition September 19, 1911, must have known where his claim was situated. He must have known also the situation of the Grant Claim, the initial stake of which was identical with his (Trans. pp. 507, 508). Lyng testified that the Grant Claim did not overlap his (Trans. pp. 521, 522).

We may then conclude that the only justification for the overlapping of the Lyng Claim by the Jensen location as set forth in the decree, must be found in the deductions of the surveyor Gibson. It may be asked why, the defendants who do not own the

Lyng Claim are prejudiced by a decree, which takes in ground included within the Lyng Claim boundaries. The defendants' interest in the scope of the decree arises not because of the loss of the Lyng Claim, which they do not own, but because a floating location is placed by the lower Court over their property. The floating character of the location is shown by evidence that its corner stakes are located on hearsay evidence, and its western line is located, contrary to all the direct evidence in the case. While Jensen was making his location, he could see plainly the Robert Lyng stakes (Trans. p. 224). He intended to keep outside the stakes of Lyng's location. He could see the six stakes of Lyng's Claim (Trans. p. 224) and he kept away from them. Where is the evidence in the case at bar which conflicts with Jensen's statement? And yet because of a "theory" of the Surveyor Gibson, the complaint is amended, and the floating location is anchored over a portion of the original Lyng Location. Although the Grant Location was plainly marked on the ground, and was known to Lyng, Jensen and the other pioneers of that section, and although defendants and their predecessors have held possession of the ground, they are now to be dispossessed by a decree, which contrary to the evidence, locates a claim in such a way as to conflict with their location. We submit that Lyng and Jensen must have known where their respective claims were located, and that the decree is in hopeless conflict with the

direct evidence in the case, and hence is not sustained by the evidence.

CONCLUSION.

A very careful reading of the voluminous record in this case has impressed us with the strenuous efforts made by plaintiff to overcome the mass of testimony introduced by defendants as to the character and extent of their possession. One obvious example of plaintiff's efforts in this regard, is shown in the struggle to prevent a jury trial on the question of ownership, where a jury gathered from a population engaged principally in mining would be liable to look with favor upon an ownership built up by years of toil, struggle and expense. At the close of our brief, counsel cannot help but feel how inadequately after all he has shown the strength of appellants' position as it stands forth from every page of the transcript. It is only by a reading of all the testimony and proceedings in the Court below that we can gain an adequate conception of the wrong which defendants will suffer if the judgment shall be affirmed. Counsel realizes how serious is his responsibility in the attempt herein made to seek a redress of the wrong which the decree at bar visits upon his clients—a responsibility heightened by the fact that counsel knows the strength of appellants' case, but fears that he may not have made the exposition thereof complete.

Counsel feels certain however that the testimony as to defendants' ownership of the claim in controversy is so clear and strong that no inadequacy in counsel's presentation of the case, can affect the strength of defendants' position.

Dated, San Francisco,
October 16, 1912.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE PACIFIC COAL AND TRANSPORTATION COMPANY (a corporation), and M. D. McCUMBER,
Appellants,

vs.

PIONEER MINING COMPANY (a corporation),
Appellee.

No. 2150

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is a suit to quiet title brought on November 7th, 1910, under Sec. 475 of the Codes of Alaska, to quiet title and to determine adverse claims to that certain placer mining claim situate in the Cape Nome Recording District, District of Alaska, known as Bench Claim No. 1 Moonlight Creek near Moonlight springs.

The complaint (Tr., p. 1) in substance alleges that plaintiff is now and for a long time hitherto has been the owner of that certain placer mining claim lying and being in the Cape Nome Recording District, District of Alaska, and known as Bench No. 1 Moonlight Creek near Moonlight Springs, and described therein by metes and bounds and courses and distances according to Survey No. 608.

That defendants and each of them claim and assert an interest in said premises, adverse to plaintiff, the extent and nature of which adverse claims are to plaintiff unknown. That the claims of said defendant and each of them are without any right whatsoever; that the value of the property is Ten thousand dollars; and prays that the defendants be forever restrained and enjoined from asserting any claim whatsoever in and to said premises adverse to plaintiff, etc.

To this complaint the defendant, the Pacific Coal and Transportation Company, and the defendant, M. D. McCumber, answered separately (Tr., p. 9). The answers are not in the record but it appears from the Opinion of the trial Judge that they were filed (Tr., p. 9), and in substance were that the answers of each of said defendants are identical except that the defendant McCumber is alleged to be a lessee under a lease from the defendant, the Pacific Coal and Transportation Company. Both answers deny all of the material allegations of the complaint and specifically deny the possession of plaintiff.

Then follow four separate and affirmative defenses.

In the first affirmative answer of the defendant corporation, the said defendant alleges that it is the owner of the Moonlight or Grant claim under and by virtue of a valid location, describing the same by metes and bounds and courses and distances, and alleges that it and its grantors and predecessors in interest, are the owners in fee of the whole of said claim, having entered in the exclusive, open and notorious possession of the whole of said claim on the 9th day of January, 1889, and ever since have been in the uninterrupted, exclusive, open and notorious possession of the whole of said claim. The said defendant in its said answer then sets up its written lease to the defendant M. D. McCumber, dated the 15th day of August, 1908.

Paragraph IV of the Answer of the defendant corporation alleges that the alleged placer mining claim described in Paragraph IV of plaintiff's complaint as Bench No. 1 Moonlight Creek near Moonlight Springs, covers and embraces an overlap of a large portion of the westerly end of the Grant claim above described, and now in possession of said answering defendant as above mentioned, the exact boundaries and limitations claimed by said plaintiff being unknown to said answering defendant; that said plaintiff has no right, title, interest or estate in and to that said part or portion so claimed of the said Grant claim, but wrongfully and unlawfully and without right, asserts

title and ownership thereto; said defendant then again alleges that it is in possession of said overlap.

In its second affirmative defense said defendant sets up ownership in the said Grant claim and alleges that it and its grantors and predecessors in interest, have been in the uninterrupted, notorious and exclusive possession of the whole of said placer claim, under color and claim of said title by reason of said Grant location, ever since the 9th day of January, 1889.

The third affirmative defense of said defendant alleges that said defendant was in the exclusive possession of the said overlap at the time of the commencement of this action by plaintiff.

In the fourth affirmative answer said defendant pleads an estoppel against plaintiff. The said defendant then prays judgment:

1st: That the complaint of plaintiff be dismissed.

2nd: That it be decreed that the defendant, the Pacific Coal and Transportation Company, is the owner in fee of the whole of said Grant claim as above described.

4th: That it be decreed and adjudged that the plaintiff has no claim, estate, interest or demand in or to any part or portion of said Grant claim as above described.

5th: That it be adjudged and decreed that the plaintiff be forever barred and enjoined from asserting any claim, right, title, interest or estate

in or to any part or portion of said Grant claim as above described.

7th: For such other and further relief as may seem meet and proper to the Court (Tr., p. 9).

To the answers of said defendants, plaintiff filed a reply, denying all of the several affirmative answers (Tr., p. 12).

Thereafter and on May 20th, 1911, the defendant corporation presented to the Court a motion to have this cause placed on the jury calendar for trial and after argument of counsel, said motion was submitted to the Court, taken under advisement (Tr., p. 8) and denied (Tr., p. 19).

Thereafter and on February 1st, 1911, the defendant gave notice of a motion to submit certain issues herein to the jury (Tr., p. 19), which motion was thereafter argued by counsel for plaintiff and defendants and by the Court denied (Tr., p. 20).

Thereafter by stipulation of counsel, this cause was set for trial on Tuesday, September 5th, 1911, subject to a motion for continuance (Tr., p. 20).

Thereafter on November 6th, 1911, the defendants separately filed amended answers to the complaint herein (Tr., pp. 25-44, and Tr., pp. 45-76).

The said amended answers being identical except that the defendant McCumber is alleged to be the lessee of the defendant Pacific Coal and Transportation Company. Both answers deny all of the material

allegations of the complaint and especially deny the possession of the plaintiff (Tr., p. 90).

Then follow seven separate and affirmative defenses.

The first affirmative defense alleges, among other things, that the defendant Pacific Coal and Transportation Company is the owner of the Moonlight or Grant claim alleged to have been located on the 9th day of January, 1899, describing it by metes and bounds according to survey; sets up the tenancy of McCumber under a lease dated the 5th day of August, 1908; also alleges that the placer mining claim described in Paragraph IV of plaintiff's complaint as No. 1 Bench Moonlight Creek near Moonlight Springs, covers and embraces an overlap of a large portion of the westerly end of the Grant claim as described by defendants, and alleges that the exact boundaries and limitations claimed by the said plaintiffs are unknown to the said answering defendants and that the said plaintiff has no right, interest or estate in and to said part or portion so claimed by the said defendants under said Grant claim, but wrongfully, unlawfully and without right assert title and ownership thereto; and the said defendants then again allege that they are in possession of said overlap and said Grant claim.

In the second affirmative defense defendants allege ownership of the said Grant claim and that their grantors and predecessors in interest have been in the

uninterrupted, notorious and exclusive possession of the whole of said Grant claim under color and claim of title by reason of said Grant location ever since the 9th day of January, 1899.

The third affirmative defense in substance is that the defendants were in the exclusive possession of the whole of the Grant claim, including the ground in controversy, on the date when plaintiff commenced this cause of action, to wit: the 7th day of November, 1910.

The fourth affirmative defense alleges ownership in the defendants by reason of the Grant location made on the 9th day of January, 1899, describing the premises by metes and bounds, the transfer by mesne conveyances to the defendant, Pacific Coal and Transportation Company; that plaintiff asserts ownership, title and possession to a large portion of the westerly part of the Grant claim as described in paragraph IV of plaintiff's complaint; that plaintiff ought not to be permitted to allege and assert that it is the owner and entitled to the possession of said part of said Grant claim, or any part thereof,

> "because that ever since the 9th day of January, 1899, this answering defendant, the Pacific Coal and Transportation Company, its predecessors and grantors, were the owners of the said Grant claim as above described by metes and bounds and in the exclusive possession thereof, and entitled to such exclusive possession, and because that ever since said 9th day of January, 1899, the defendant, the

Pacific Coal and Transportation Company, its grantors and predecessors in interest, were, have been and now are in the uninterrupted, open, adverse and notorious possession of the whole of said Grant claim and the conflict area thereof, and have been engaged for more than seven years last past in operating, mining and developing the said premises and particularly the part in controversy in this action, with full knowledge and notice on the part of said plaintiff, and without any objection, intervention or complaint on its behalf; that the defendant, Pacific Coal and Transportation Company, and its lessees have expended large sums of money in mining, prospecting and developing the said area in conflict of said Grant claim, without objection or complaint from or on behalf of said plaintiff and with its full knowledge, ever since the location thereof on January 9, 1899."

The fifth affirmative defense alleges that at all times mentioned in plaintiff's complaint the defendant, Pacific Coal and Transportation Company, its grantors, and predecessors in interest were in the actual, open, exclusive, notorious and uninterrupted possession of the premises in dispute.

The sixth affirmative defense alleges that plaintiff's cause of action was barred by the provisions of Secs. 3 and 4 of Chapter 2, Part IV of the Civil Code of Alaska, and by virtue of Sec. 361, Chapter 38, Part IV, of the Civil Code of Alaska.

The seventh affirmative defense recites the history of certain litigation conducted in the District Court

for the Division in which this case was tried, between the Moonlight Springs Water Company, plaintiff, vs. George Doverspike, et al., defendants, whereby the Moonlight Springs Water Company sought to enjoin Doverspike et al. from polluting the waters of Moonlight Spring, and alleges that by reason of the matters and things alleged in said affirmative defense the plaintiff is estopped from asserting title to the premises in controversy. The said defendants then pray judgment as follows:

"1. That the said complaint of plaintiffs be dismissed.

"2. That it be adjudged and decreed that the defendant, Pacific Coal and Transportation Company, is the owner in fee of the whole of said Grant claim, as above described.

"3. That it be adjudged and decreed that the title to the ground in controversy be quieted and confirmed in this answering defendant, subject to the leasehold estate of the defendant M. D. McCumber.

"4. That it be decreed and adjudged that the plaintiff has no claim, estate, interest or demand in or to any part or portion of the said 'Grant' claim as above described.

"5. That it be adjudged and decreed that the plaintiff be forever barred and enjoined from asserting any claim, right, title, interest or estate in or to any part or portion of the said 'Grant' claim as above described.

"6. That this answering defendant do have and recover its costs and disbursements in this action.

"7. For such other and further relief as may seem meet and proper to the Court" (Tr., p. 94).

To the amended answers plaintiff filed separate replies (Tr., pp. 77-82; Tr., pp. 83-88), denying all the allegations of the first affirmative defense except that the premises described in its complaint called Bench No. 1 Moonlight Creek covers and embraces a portion of the westerly end of the alleged Grant claim as described in defendants' answers and denies all of the material allegations of the several affirmative defenses except that it admits that the actions therein mentioned were commenced as therein alleged and that the legal proceedings had in said actions were had as therein alleged and that in the year 1906 the Moonlight Water Company was organized.

In reply to said answer and the sixth affirmative defense plaintiff alleged in each of said replies:

"1st. That the defendant, Pacific Coal and Transportation Company, is a foreign corporation organized under the laws of the State of Maine, and has not, since the year 1907, filed any annual statement with the Clerk of the District Court for the District of Alaska, Second Division, and has not prior to February 8th, 1904, filed with said Clerk of said Court, an authenticated or other copy of its charter or articles of incorporation, or any statement, as required by Chapter 23, Part V,

of the Civil Code of the District of Alaska; and had not prior to said last named date, designated an agent within the District of Alaska, or at all, upon whom service of process might be had as required by said chapter of the Code of the District of Alaska.

"2nd. That said defendant, Pacific Coal and Transportation Company, have not, since the year 1909, and for more than one year prior to the commencement of this action, had a designated agent resident within the District of Alaska upon whom service of process might be had, as provided for in Chapter 23, Part V, of the Code of the District of Alaska; and have not, during said last named period, had any agent or officer or representative resident within the District of Alaska, or within the District of Alaska upon whom service of process might be had.

"3rd. That the defendant, Pacific Coal and Transportation Company, claims title to the alleged Grant placer mining claim from the Corwin Trading Company, a foreign corporation organized under the laws of the State of New Hampshire.

"4th. That said Corwin Trading Company has never at any time filed an authenticated copy, or any copy, of its articles of incorporation or charter, or any statement or designation of any resident agent, with the Clerk of the District Court, Second Division, of the District of Alaska, as required by Chapter 23, Part V, of the Code of the District of Alaska, and has never had any officer or agent upon whom service of process is

authorized or might be had, resident within the District of Alaska."

The issues presented by the pleadings are:

1st. General issues involving the location of the respective placer mining claims;

2nd. The statute of limitations;

3rd. Title by prescription in defendant;

4th. Equitable estoppel;

5th. Laches.

The suit was brought before the Court sitting without a jury and judgment rendered in favor of the plaintiff and against the defendants.

The undisputed facts, as they appear in the evidence, are that the plaintiff's location Bench No. 1 on Moonlight, was located on the 3rd day of January, 1899 (Tr., pp. 211-227), and the defendant's location of the Grant claim was made on the 9th day of January, 1899 (Tr., p. 228), with the assistance of the locator of the said Bench No. 1 claim. For some reason which is not apparent to us, and contrary to the record, appellants state that said Grant claim was located on the 3rd day of January, 1899 (Br., p. 2), and prior to the location of the Bench claim on said last mentioned day (Br., p. 4).

That the boundary marks of the plaintiff's location as established upon the ground by its locator at the time the location thereof was made (Tr., p. 216), were re-placed in their original position in 1902 (Tr., p. 330) and in 1909 or in 1910 (Tr., p. 281), and the boundaries remain the same as in 1899 (Tr., p. 233).

During the trial it was stipulated that the record title to the Bench No. 1 on Moonlight Claim was in the plaintiff (Tr., p. 231), and it was further shown that on September 16th, 1903, the said claim was conveyed to plaintiff (Tr., p. 232).

It further appears in the evidence that the plaintiff in addition to making the requisite annual expenditure had for several years prior to the commencement of this action maintained upon the ground in controversy a large ditch and also a nest of pen-stocks, from which ditch and pen-stocks have been constructed at least six pipe lines varying in size from twelve to thirteen inches, extending over and across the area in conflict, said pipe lines having been used in conveying water to plaintiff's various mining operations in the immediate vicinity, a portion of the water so conveyed being applied on the lower or westerly end of Bench Claim No. 1 during the two or three years immediately preceding the commencement of this action, in conducting extensive mining operations upon Bench Claim No. 1; that during each year since the construction of said pen-stocks and pipe lines plaintiff has expended from Eight hundred dollars to Twelve

hundred dollars in repairs and improvements and cleaning of the pipe lines upon the ground in controversy.

That during the summer of 1910, from about the 12th of May to the 27th of October, the defendants were not in the actual possession or engaged in mining upon the Grant claim, nor the ground in controversy, during which time plaintiff was carrying on extensive mining operations on Bench Claim No. 1 by hydraulic process, and that on the 7th day of November, 1910, the date of commencement of this action, two employees of the plaintiff were engaged in mining upon said Bench Claim No. 1 (Tr., p. 98; Tr., p. 276).

ARGUMENT.

I.

MULTIFARIOUS ASSIGNMENTS OF ERROR ARE NOT VIEWED WITH FAVOR BY THE FEDERAL COURTS.

The defendants announce to this Court that they rely on seventy-nine alleged errors in prosecuting this appeal (Tr., pp. 173-190) (Br., p. 2).

> "What the assignment of errors lacks in quality is made up in quantity. They are one hundred and thirty-four in number. As is generally the case, such interminable assignments, instead of impressing the Court with the thought of an imperfect trial, rather cast discredit upon the worth of

any of them. In *Times Publishing Co.* vs. *Carlisle,* 94 Fed., 762-781, Judge Sanborn quite aptly hit this too common practice:

"'When counsel of the learning and ability of those who presented this case, gravely announce to an appellate court that they rely upon seventy-four alleged errors for the reversal of the judgment against their clients and some of those specified turn out to be as frivolous as those we have just cited, it is at least difficult to resist a suspicion that they themselves were not certain there was no substantial error in the case.'"

Shepard vs. *U. S.,* 160 Fed., 584-592.

In *Chicago Co.* vs. *M'Donough,* 161 Fed., 657, Judge Vandevanter, speaking for the Court, said:

"There was nothing unusual about the case as it was presented in the Circuit Court, as respects either the volume of evidence produced or the number of questions of law arising for decision, and yet more than sixty assignments of error are made and seemingly relied upon.

"All of these have been tentatively considered, but we feel constrained to repeat the admonition given in *Mich. Home Colony Co.* vs. *Tabor,* 141 Fed., 332, that—

"'The practice of filing such a large number of assignments can not be approved. It thwarts the purpose sought to be subserved by the rule requiring assignments. It points to nothing. It leaves opposing counsel and the Court as much in

the dark concerning what is relied on as if no assignments were filed.' "

And we also repeat the observation made in *Shepard* vs. *U. S.,* 160 Fed., 584-592, that generally speaking:

" 'Such interminable assignments, instead of impressing the Court with the thought of an imperfect trial, rather cast discredit upon the worth of them.' "

II.

OBJECTION TO A COURT OF EQUITY TRYING TITLE TO LAND IS WAIVED BY ANSWER WHICH SEEKS EQUITABLE RELIEF.

The defendants separately answered; thereafter the defendants moved the Court "to have this cause placed on the jury calendar for trial" (Tr., p. 8), which motion was denied (Tr., p. 19).

Thereafter the defendants gave "notice of a motion to submit certain issues herein to the jury" (Tr., p. 19), which motion was denied (Tr., p. 20).

Upon principle and authority, the record in the case at bar presents a plain and clear case of equity jurisdiction, and that it was properly exercised.

We submit that by all the authorities, the Court here was competent to grant the relief sought, it having jurisdiction of the subject-matter. The right to an issue or a trial by jury may be waived, either expressly or by not insisting on it at the proper time.

The only substantial objections ever urged against the power or propriety of a determination of the question of title by a court sitting in equity are that equity has not jurisdiction when there is an adequate remedy at law—that to do so would deprive the party of the right to a trial by jury and the question of legal title must be decided at law but not in equity.

> "The rule, that disputed titles must be established at law, is for the reason that equity will not in general try disputed titles of land. But the rule is one of expediency and policy, rather than an essential condition and basis of equitable jurisdiction."

1 *Pom. Eq. Jur.*, 252.

Thus, as to the right to a jury trial, that does not exist in cases where equity has jurisdiction, and if it did, it can always be waived.

> "If a defendant in a suit in equity answers and submits to the jurisdiction of the Court (as in the case at bar), it is too late for him to object that the plaintiff has a plain and adequate remedy at law. I *Daniel Ch. Pr.* (4th Am. Ed.), p. 555; *Reynes* vs. *Dumont,* 130 U. S., 395; *New Orleans* vs. *Morris,* 105 U. S., 600. Good faith and an early assertion of rights are as essential on the part of the defendant as of the plaintiff. *Brown* vs. *Iron Co.,* 134 U. S., 530."

Levi vs. *Evans,* 57 Fed., 677.

See also:

Book vs. *Justice Co.,* 58 Fed., 827.

An action at law or a feigned issue is not jurisdictional.

Belknap vs. *Trimble,* 3 Paige, 601.

The feigned issue is not made for the purpose of defeating the jurisdiction of the Court but to aid the conscience of the Court on a question of fact which is incidental and material to the trial of the issues and merits of the case. By calling for the statement of feigned issue, the jurisdiction is again consented to.

> "It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity alone can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."
>
> *Holland* vs. *Challen,* 110 U. S., 25;
> *Gormley* vs. *Clark,* 134 U. S., 349;
> *Wehrman* vs. *Conklin,* 155 U. S., 322.
>
> "The reasoning in the case of *Holland* vs. *Challen,* 110 U. S., 23, is very apt when considering cases under our (Alaskan) code. In this case the Court quotes a Kentucky statute which is very similar to ours; also a statute of Nebraska which

is very much broader than ours as it authorizes a suit even to parties out of possession."

Opinion (Tr., p. 15).

In overruling the defendant's motion to have the case at bar tried to a jury, Judge Murane said:

"The Circuit Court of Appeals for the Ninth Circuit in the case of *Madden* vs. *McKay,* 144 Fed. Rep., 64, seems to very clearly lay down the proper procedure in a case of this character and appears to establish the rule by which this Court should be guided in passing upon the question as to whether or not an action should be tried to a court of equity or should be transferred to the law side of the court and tried to a jury. We quote from the opinion in said case:

" 'Under such a statute (Sec. 475 of the Alaska Code), if the facts pleaded present a case of equitable cognizance the case should be heard on the equity side of the court according to the procedure provided for the disposition of such cases, and if the complaint is sustained the plaintiff will be given equitable relief. If, on the other hand, the facts alleged are such as to bring the case within the cognizance of a court of law, it will be tried as an action at law and the right of the parties to a jury trial will be conserved. If the complaint be framed ostensibly as a bill in equity and yet is in substance a complaint in an action at law, the remedy of the defendant is to move that it be dealt with and heard as an action at law.'

"This, in substance, is what the defendants are

now demanding in this case, but it will be seen from the quotation from the above case that the issue is determined from the allegations of the complaint."

Opinion (Tr., pp. 13-14).

But "even an objection that the action should have been brought at law instead of in equity may be waived by failure to take advantage of it at proper time."

Insley vs. *U. S.*, 515.

See also:

Opinion (Tr., p. 18).

Judge Murane further said:

"The Supreme Court of the State of Oregon in a number of decisions sustained the validity of their Sec. 500, which in substance is the same as our (Alaskan) Sec. 475, and even has gone further in that the Court has held that the plaintiff need not be in possession in order to maintain the action if the defendant is not in possession. *Cooldige & McClaine* vs. *Forward,* 11 Or., 118; *Thompson* vs. *Woolf,* 8 Or., 455. . . . The Supreme Court of the United States has sustained the Oregon statute in the well considered case of *Stark* vs. *Starr,* 73 U. S., 409."

Opinion (Tr., pp. 14-15-18).

The complaint in this case contains every averment essential to the statutory complaint to quiet title.

See

Ely vs. *New Mexico,* 129 U. S., 291;
Goldsmith vs. *Gilliland* (Oregon), 22 Fed., 867.

In *Ely* vs. *New Mexico* the allegations of the complaint were:

1. That the plaintiff was the owner in fee of certain land;

2. That the defendant claimed an estate or interest in and to said land adverse to the plaintiff, and that said claim was unfounded.

It was held that the complaint was sufficient to authorize the Court to determine the claim of the defendant, and the title of the plaintiff, and, also, if the facts proved at the hearing justified it, to grant an injunction, or other equitable relief.

Were this not so, the answer supplied any possible deficiency of allegation.

Webb vs. *Davis,* 32 Ark., 554.

See

Johnson vs. *Waters,* 111 U. S., 640.

The right of a party in possession to sue in equity to

determine an adverse claim cannot be taken away by a wrongful intrusion upon the smallest fraction of his possession. The court of equity having obtained jurisdiction to quiet the title, will not stop and discriminate between the bulk of the property still in possession of the plaintiff and the portion intruded upon, but in conformity to its well known principles will proceed and decree full and final relief in the premises.

So, in *Book* vs. *Justice,* 58 Fed., 827, as we understand the opinion, though the complainants were in possession of a portion of the ground claimed by the defendants, and the defendants might have maintained ejectment therefor, a decree was made enjoining the complainants from asserting any claim to or working upon any portion of the ground claimed by defendants. The principles there announced as to the duty of the court having regularly obtained jurisdiction of the case as an equity case under the pleadings, to settle the rights of the parties although an action at law might have been sustained.

In the case at bar the defendant, McCumber, interposed a general demurrer (Tr., p. 5, which was overruled (Tr., p. 7).

No demurrer was interposed by the defendant corporation.

Thereafter and before demanding a trial to a jury both defendants answered separately (Opinion, Tr., pp. 9-11).

The answers of each of said defendants were iden-

tical, except that the defendant McCumber is alleged to be a lessee under a lease from the defendant, the Pacific Coal & Transportation Company. Both answers deny all the material allegations of the complaint and specifically deny the possession of the plaintiff. Then follow four separate affirmative defenses (Tr., pp. 10-11).

It thus appears that the defendants not only answered by denials and by affirmative matter constituting a defense but they answered by a pleading in the nature of a cross-complaint, in which they pleaded title to a portion of the ground described in the complaint, in the defendant corporation subject to a leasehold interest in the defendant, McCumber, and prayed that the defendant corporation be decreed to be the owner of the premises in controversy; thus submitting to the determination of the Court the very issue the plaintiff sought to have submitted.

The defendants by their own volition sought the equitable relief of the court and distinctly invoked its equitable interference.

By thus pleading, the defendants waived any right they may have had to object to the power of the Court to deal with the case as one in equity; the Court having the power to grant the relief sought.

Johnson vs. *Waters,* 111 U. S., 640;
Cavender vs. *Cavender,* 114 U. S, 464;
Union Trust Co. vs. *Midland Co.,* 117 U. S., 434;

Reynes vs. *Dumont,* 130 U. S., 395;
Kilbourn vs. *Sunderland,* 130 U. S., 505;
Brown vs. *Iron Co.,* 130 U. S., 530;
Insley vs. *U. S.,* 150 U. S., 512;
Perego vs. *Dodge,* 163 U. S., 160;
Book vs. *Justice Co.,* 58 Fed., 827;
Richardson vs. *Green,* 61 Fed., 423;
Williamson vs. *Munroe,* 101 Fed., 322;
S. P. Co. vs. *U. S.,* 133 Fed., 651;
Forderer vs. *Schmidt,* 146 Fed., 480;
Cockrell vs. *Warner,* 14 Ark., 345;
Pindall vs. *Trevor,* 30 Ark., 250;
Cohen vs. *Knox,* 90 Cal., 266;
Antonelli vs. *Lumber Co.,* 140 Cal., 309;
Hawthorne vs. *Smith,* 3 Nev., 182;
O'Hara vs. *Parker,* 27 Or., 156;
State vs. *Blize,* 37 Or., 404;
Siedschlad vs. *Griffin,* 132 Wis., 106.

The objection that the action should be tried to a jury instead of a court of equity, is waived by failure to take advantage of it at the proper time by appropriate plea; the question not being jurisdictional but going only to the particular remedy pursued.

Insley vs. *U. S.,* 150 U. S., 512;
O'Hara vs. *Parker,* 27 Or., 156;
Bates vs. *Drake,* 28 Wash., 447;
Weatherwax L. Co. vs. *Ray,* 38 Wash., 545.

After the denial of defendants' motion to try the case to a jury, the defendants moved the Court to submit certain issues to the jury (Tr., p. 19), which also was denied (Tr., p. 20). Thereafter the defendants filed separate amended answers (Tr., pp. 25-44, Tr., pp. 45-76), and on the issues so joined the case proceded to trial before the Court.

In *Ely* vs. *New Mexico,* the Supreme Court, in sustaining the jurisdiction adverted to the distinction between cases arising in state and territorial courts and cases in the Federal Circuit Court. It rests upon the proposition that in the Federal courts, where the separation of law and equity is preserved, the plea must show some reason for resorting to equity. If in *Eli* vs. *New Mexico,* the plea had averred possession in the plaintiff, the jurisdiction would have been upheld on general principles, even if the case had originated in the Federal courts. Having regularly obtained jurisdiction of the case at bar, under the pleadings as an equity suit, it was the duty of the Court to settle and determine the rights of the parties in accordance with the principles of equity and justice, although the case might have been tried to a jury to settle and adjudicate their rights.

Book vs. *Justice Co.,* 58 Fed., 827, and authorities there cited on pp. 831 and 832.

> "Under Sec. 475, Code Alaska, providing that any person in possession of real property, may

maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, and Rev. Stat., Sec. 910, which provides that no possessory action for the recovery of any mining title shall be affected by the fact that the paramount title to the land is in the United States, but each case shall be adjudicated by the law of possession, one in possession of a mining claim in Alaska under a valid location has such title as will support an action to quiet title against an adverse claimant."

Fulkerson vs. *Chisna,* 122 Fed., 783.

Equity regards not form in these matters. It is enough that the averments and issues joined present a case for the exercise of its powers.

But the appellants urge in their brief that by virtue of the Seventh Amendment to the Constitution of the United States, they had a right to a trial by jury in the case at bar, and cite a number of authorities to sustain that position. In our opinion it is not necessary to review these authorities, for the question of waiver of such right was not presented in or passed upon in any of the cases so cited.

But, assuming for the sake of argument, that the appellants had a right to a trial by jury herein, then we submit that such right was waived by them, by their having previously submitted to the equitable jurisdiction of the Court, and the person who waives a consti-

tutional provision should not be heard afterwards to claim the protection of it.

Lee vs. *Tillotson,* 24 Wend., 337;
Mayor vs. *N. Y. Co.,* 143 N. Y., 26.

"It is a well settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured (*Brooms Legal Maxims,* 547). It extends to all provisions, even constitutional and statutory as well as conventional. . . . This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred."

Knarston vs. *Manhattan L. Co.,* 143 Cal., 63.

See also:

Morton vs. *Nebraska,* 21 Wall., 660;
Clark vs. *Barnard,* 108 U. S., 436;
Gunter vs. *Atlantic Coast, Etc., Co.,* 200 U. S., 273;

in which three last cases there was a waiver on the part of a state of the Fifth Amendment to the Federal Constitution.

See also:

Great Falls Co. vs. *Garland,* 124 U. S., 581;
Pierce vs. *Somerset Ry.,* 171 U. S., 648;
Skinner vs. *Franklin,* 179 Fed., 862;

Hurley vs. *Allman,* 129 N. Y. Sup., 14;
People vs. *Police Com.,* 174 N. Y., 17.

Pleading in bar to an indictment, was held to be a waiver of the right to object to the constitutionality of a law by which the grand jury was made up.

U. S. vs. *Gale,* 109 U. S., 65.

See:

Hoy vs. *Hubbell,* 109 N. Y. Sup., 301.

In an equitable action, such as is the case at bar, the submission of an issue of fact to a jury is entirely discretionary.

Garsed vs. *Beall,* 96 U. S., 695;
Wilson vs. *Riddle,* 123 U. S., 615.

So the jury's verdict when rendered is merely advisory and not binding upon the Court.

Harding vs. *Handy,* 11 Wheat., 121;
Pront vs. *Roby,* 15 Wall., 475;
Little vs. *Alexander,* 21 Wall., 503;
Watt vs. *Starke,* 101 U. S., 252;
Quinby vs. *Conlan,* 104 U. S., 424;
Perego vs. *Dodge,* 163 U. S., 165.

It may be disregarded entirely, and a decree at vari-

ance therewith may be entered without formally setting it aside.

Idaho Co. vs. *Bradbury,* 132 U. S., 516;
Kohn vs. *McNulta,* 147 U. S., 240.

We submit that under the circumstances of this case the trial court did not err in denying appellants' demand for a jury.

III.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A CONTINUANCE OF THE TRIAL FOR THE PURPOSE OF RE-TAKING THE DEPOSITION OF ANDREW JENSEN.

The motion for a continuance of the trial for the re-taking of the deposition of Andrew Jensen was addressed to the discretion of the Court and being based upon insufficient grounds was properly denied.

The defendants admit that they were disappointed in the testimony given by the witness Andrew Jensen, a resident of North Dakota, in a deposition taken at their instance, and sought to re-examine him for the purpose of laying the foundation for impeachment of his statements contained in said deposition if he continued to deny the statements purporting to have been made by him anterior thereto in alleged letters and telegrams sent by him to his son, a resident of the place in which the trial of this case was had, and of

which the defendants had knowledge prior to the taking of said deposition.

Continuances are not favored in the law and in a country like Alaska where there are so many changes and vicissitudes, it is impossible to attain the attendance of witnesses from term to term as in older communities and unless the courts of that district are prompt in the adjudication of controversies there would be no security for private rights therein.

However pleasing it might have been for the defendants to have been allowed to attempt to morally convict their witness Andrew Jensen of perjury, it being prevented from doing so made no material difference in the outcome of this case. The record shows that Jensen was corroborated in all the essential particulars by all of the plaintiff's witnesses who were interrogated upon matters affecting the location of the plaintiff's claim or its relative position with those in its immediate vicinity. The most cursory examination of the respective notices of location of the several claims of the plaintiff and defendants alone justifies the statement that the plaintiff's location was the first in time and therefore is the first in right and must be held free from the illogical imputation of overlapping the defendant's junior claim, the validity of which latter location is of serious doubt.

There is nothing in defendant's point that the plaintiff did not oppose their motion for said continuance. The inherent weakness of the affidavit filed in support

of that motion presaged its denial; and the record shows they were not subsequently injured thereby. The Court did not abuse its discretion in refusing to continue the trial for the purpose of re-taking said deposition. It is well settled that the granting of a motion for a continuance is a matter resting in the sound judicial discretion of the lower court, whose ruling is not the subject of review unless for an abuse of such discretion.

Drexel vs. *True,* 74 Fed., 12;
Davis vs. *Patrick,* 57 Fed., 909;
Copper River Co., vs. *McClellan,* 138 Fed., 333;
Woods vs. *Young,* 4 Cranch., 237.

IV.

THE DEFENDANTS WERE PRACTICALLY IN CONTEMPT OF COURT IN MAKING THE MOTION FOR A CHANGE OF TRIAL JUDGE HEREIN.

Sec. 808 Carter's Alaska Codes declares that:

"A judicial officer is a person authorized to act in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:

"1st. In an action or proceeding to which he is a party, or in which he is directly interested;

"2nd. When he was not present and sitting as

McCumber's said affidavit merely states the conclusions of the affiant and is absolutely unsupported upon the record by any facts whatsoever.

The trial judge, according to McCumber, is friendly to the plaintiff. *Non constat* that he is just as friendly with the defendants. It can not be possible that elevation to the bench causes its occupant to sever his social relations with all who may become litigants before him. In any event, the bias and prejudice on the part of a judge is not, under the Alaskan Codes, ground for his disqualification within the District of Alaska.

> "It appears that upon the hearing in said court, of a motion made by the petitioner Jones for a change of the place of trial of a certain civil action to which said petitioner was a party, the petitioner filed, presented and read a certain affidavit, and that he was adjudged guilty of contempt for and on account of certain language and statements used and made in said affidavit. It is not necessary to set forth the affidavit here, and it is quite clear that it is of such a character that the act of petitioner in presenting it was disorderly, contemptuous and insolent behavior toward the judge of said court while holding the same, and, as such, was a contempt of said court. If the matter of the affidavit had been material and relevant, and pertinent to any issue before the Court, a different question might be presented. If bias, prejudice, or partiality on the part of a judge was a ground for a change of venue, a party seeking such change

upon such ground would have the right to state in an affidavit the facts upon which he based his charge of said bias."

In re David, 103 Cal., 397.

"As to the appeal from the order denying the defendant's motion to change the place of trial, it is to be observed that the only ground of the motion alleged or attempted to be proved was, that the judge of said court is disqualified from acting in said case on account of his bias and prejudice as against the defendant and A. Pettibone, its President and Resident Manager, which is not one of the grounds of disqualification enumerated in Sec. 170 of the Code of Civil Procedure and therefore not a ground of disqualification."

Mining Co. vs. *Mining Co.*, 83 Cal., 617.

The affidavits of McCumber and Bruner were entirely irrelevant, immaterial and contemptuous, and there is no excuse for or justification of their presentation.

V.

A VALID LOCATION CARRIES WITH IT THE RIGHT OF EXCLUSIVE POSSESSION OF THE SURFACE.

The plaintiff's Bench claim No. 1 on Moonlight was made on January 3, 1889 (Tr., p. 224); the defendants' Grant location was made on June 9th, 1899 (Tr., p. 432). The defendants answering separately

asserted title in the corporation defendant of said Grant claim, which they claim, overlaps the northerly portion of the plaintiff's said claim (Tr., p. 29), and denied generally the plaintiff's ownership of the said Bench claim No. 1 on Moonlight.

A valid location of a mining claim, coupled with annual expenditure, give and continue the *exclusive* right of possession and of the location, which may be actual or constructive as its claimant may elect.

Belk vs. *Meagher,* 104 U. S., 279;
Wolverton vs. *Nichols,* 119 U. S., 485;
Gwillim vs. *Donnellan,* 115 U. S., 48;
Manuel vs. *Wulff,* 152 U. S., 505;
Black vs. *Elkhorn Co.,* 163 U. S., 445;
St. Louis Co. vs. *Montana Co.,* 171 U. S., 650;
Malone vs. *Jackson,* 137 Fed., 787;
O'Connell vs. *Pinacle Co.,* 140 Fed., 884;
Rooney vs. *Barnette,* No. 2005 (decided by this court on October 7, 1912);
McLemore vs. *Express Oil Co.,* 158 Cal., 559;
Street vs. *Delta Co.,* 42 Mont., 371;
Ricketts on Mines, Sec. 71.

The rule is well established that the rights which a valid subsisting location of a mining claim secures to the locator and his grantors and his successors are clearly defined by law and are wholly unaffected by

any subsequent conflicting location, or swinging of the boundary line of a junior location.

Belk vs. *Meagher,* 104 U. S., 279;
Del Monte Co. vs. *Last Chance Co.,* 171 U. S,, 55;
Clipper Co. vs. *Eli Co.,* 194 U. S., 220;
Brown vs. *Gurney,* 201 U. S., 184;
Farrell vs. *Lockhart,* 210 U. S., 142;
Swanson vs. *Sears,* 32 S. C. R., 455;
Zerres vs. *Vanina,* 134 Fed., 615;
Porter vs. *Tonopah Co.,* 137 Fed., 756;
Swanson vs. *Kettler,* 17 Ida., 321;
Street vs. *Delta Co.,* 42 Mont., 371.

Where a conflicting location is made the burden of proof is upon the junior locator. So it was for the defendants herein to show that the Grant location did not conflict with the *plaintiff's senior location.*

Hammer vs. *Garfield Co.,* 130 U. S., 291;
Book vs. *Justice Co.,* 58 Fed., 106;
Justice Co. vs. *Barclay,* 82 Fed., 554;
McCulloch vs. *Murphy,* 125 Fed., 147;
Bevis vs. *Markland,* 130 Fed., 227;
Zerres vs. *Vanina,* 134 Fed., 610;
McKay vs. *Neussler,* 148 Fed., 86;
Wailes vs. *Davis,* 158 Fed., 667;
Buffalo Co. vs. *Crump,* 70 Ark., 525;
Providence Co. vs. *Burke,* 6 Ariz. 333;
Quigley vs. *Gillett,* 101 Cal., 469;

Harris vs. *Kellogg,* 117 Cal., 489;
Emerson vs. *McWhirter,* 133 Cal., 510;
Callahan vs. *James,* 141 Cal., 291;
Little Dorritt Co. vs. *Arapahoe Co.,* 54 Colo., 431;
Powers vs. *Sla,* 24 Mont., 243;
Rose vs. *Richmond Co.,* 17 Fed., 25;
Axiom Co. vs. *White,* 10 S. Dak., 198.

This case could be decided on the authority of *Overman Co.* vs. *American Co.,* 7 Nev., 312, in which the Court said:

> "Each of the parties to this suit claims the disputed ground by virtue of locations made by their predecessors. The rights of these parties is limited to such ground as was originally located. . . . You must ascertain and determine from the evidence what claims were originally located and claimed and their rights (the rights of the parties) will be in *accordance,* the acts, declarations and works of the locators of the respective claims and all circumstances tending the locations can be taken into consideration"—continuing the quotation *mutatis mutandis.*

"If you should believe that the No. 1 Bench Moonlight claim was located for the ground in controversy; and, also that of the Grant claim, and the locations conflict upon the ground, the superior and paramount location and possessory right will prevail, to the extent of the prior right in the party as it existed at the time of the commencement of this action. The plain-

tiff and defendant claimed respective portions of the ground, the northern boundary of the plaintiff's claim as the southern boundary of defendant's claim. The dispute is as to the locality of the dividing line. Plaintiff has introduced evidence tending to show, and it is uncontradicted, that prior to the location of the defendant's claim the predecessors of plaintiff located No. 1 Bench Moonlight; that they planted stakes far enough north to include the controversy and recorded notice which also included the disputed ground.

The defendants have sought to show, not so much that No. 1 Bench Moonlight was not so located, but that they have been in continued possession of the whole of the Grant claim since its location on January 9, 1899, and that the rights of the plaintiff have been forfeited, both as to the remedy and as to the title."

VI.

THE PLAINTIFFS' LOCATION WAS VALID AND PRIOR IN TIME TO THAT OF THE DEFENDANTS' LOCATION.

The testimony given before the Court to the question of title of plaintiffs' Bench No. 1 on Moonlight claim is substantially as follows:

(Note: The deposition of Andrew Jensen was taken at the instance of the defendants and introduced in evidence, without objection, by the plaintiff.)

The plaintiffs' witness Andrew Jensen, the loca-

tor of said claim, testified (Tr., p. 213): "I located the claim called Bench No. 1 Moonlight in the vicinity of the Moonlight Creek, in the Cape Nome Mining District, either the 2nd or 3rd of January, 1899; it ran between Lyng's Moonlight claim on the West and Nelson's on the East and runs up toward Anvil Mountain, not very far from the base of the mountain, nearer to Anvil Mountain than Lyng's Moonlight claim. I filed a location certificate of said claim in the Cape Nome Mining and Recording District. I think there is a mistake in Exhibit "B" in saying that it is bounded on the East by Moonlight claim (referring to the copy of the location certificate attached to his deposition). This must have been made in the recorder's office or else we made a mistake when we wrote it out. I was acquainted with Otto Schueler and C. L. Spanggard in January, 1899. They were present and they assisted me in making the location of the Moonlight claim. The Moonlight claim or Bob Lyng's claim to a certain extent lay between Bench Claim No. 6 Below Good Luck and the Bench No. 1 Moonlight staked by me. I performed labor on Bench Claim No. 1 Moonlight either in February or March, 1899. Otto Schueler was there several times while I was working. I think Dr. Kittleson was there sometimes and they would go walking by there occasionally when I was working. I found gold there about the time I staked it out. It was on the upper part of the claim in the willows. There was a place where it wasn't frozen much. In monumenting Bench No. 1 Moonlight

claim I used willow stakes about four or five feet long and two or three inches in circumference,— we hewed off one side with an axe and wrote with a lead pencil 'Bench No. 1 on Moonlight' on each corner stake and on one of them I put the location notice by splitting it on top and putting the location notice in the split."

The plaintiffs' witness C. J. Jorgenson (Tr., p. 386) testified that:

"I am acquainted with the Jensen claim, the Carlson claim and the DePue claim. The Jensen claim is the same as the No. 1 Bench Moonlight. No. 1 Moonlight was located by Jensen, the Carlson claim by Mrs. Carlson and the DePue claim by DePue. The Carlson claim was located in 1899 in the Spring; I don't know the exact date; the others, I don't know when they were located. I suppose the records show that. They were located by corner stakes; one stake at each corner, when I first saw them, but the Carlson claim besides the stakes, had a hole dug down probably a foot deep and two feet across, and a stake alongside of the hole at the Northwest corner, that would be at the Northeast corner of the No. 1 Moonlight. The others, the corners were marked with willow stakes. I have been upon the Carlson claim probably three or four times every year since 1899. Sometimes more."

On cross-examination this witness testified:

"I was first on the No. 1 Moonlight claim in

the month of July, 1899. I know the Jensen claim on No. 1 Bench on Moonlight. I examined all the corner stakes at that time in July, 1899. The corners as I have already described, each had a willow stake. I was about to buy a quarter interest in the Carlson claim at that time so I had a reason to look up the adjoining claims to see if they lapped over or came in contact with the Carlson claim. My knowledge of the claims in that vicinity was not confined solely to the Carlson claim; I made an examination of the adjoining claims in that vicinity."

The plaintiffs' witness Elizabeth Carlson Jorgensen testified as follows (Tr., p. 389):

"I am now the wife of C. J. Jorgensen; my former name was Elizabeth Carlson. I am acquainted with the Carlson claim, DePue claim and Bench No. 1 Moonlight claim which was the Jensen claim at that time. The Jensen claim was located by Andrew Jensen some time in the early spring of 1899; the Carlson claim was located by John Nelson in December, 1898; the DePue claim was also located in the early spring of 1899 by DePue. The Nelson claim was first staked by myself and a couple of others for John Nelson about the 20th of December, 1898; and as Nelson did not record the claim I re-located it for myself in April, 1899. When the Nelson claim was staked it was marked by willow stakes at the four corners, and afterwards, when I located it, I put new willow stakes and used the old stakes too, and

on the Northwest corner I dug a hole and threw up a little hill of dirt and put a willow stake in there, and I left the old stake standing too. The other claims, the Jensen and DePue, were marked with willow stakes, I dug the hole myself. I have been on the claims every year a couple of times, except the last three years. My knowledge is derived from personal observation on the ground. The Carlson claim was between the Jensen claim, the No. 1 Bench Moonlight claim and the DePue claim, and adjoining them and lying parallel with them lengthwise. The long side is North and South."

The plaintiffs' witness Thomas Lyle testified as follows (Tr., 378):

"I am a miner and have lived in Nome about twelve years. In June, 1899, I became acquainted with the mining claim called No. 2 East Fork of Moonlight. I went there in the early part of June with Jess Rutter and put some new stakes on the claim—I think it was on June 7th. It was before the fleet came in that year, 1899—about fifty or sixty feet from the Southeast corner of Bench Claim No. 1 on Moonlight."

Rutter set the Southwest corner stake of No. 2 East Fork of Moonlight claim (the witness identified the stake found as at point V upon the map, Plaintiffs' Exhibit "A"); it was a stake two and a half to three feet high, blazed on one side with an axe or hatchet and marked with black lead pencil, "S. E. Corner No. 1 Bench Moonlight."

"I have been on that ground several times since that time, the last occasion being about six weeks ago. I was at the Southeast corner of Bench Claim No. 1 on Moonlight and I was also at the Southwest corner of No. 2, East Fork Moonlight. The Southwest corner of No. 1 Bench on Moonlight as I saw it about six weeks ago was in the same position as when I saw it in 1899 on the 7th day of June."

The witness further testified in substance that Mr. Rutter had staked the claim No. 2 on the East Fork of Moonlight prior to June 7th, 1899, with two stakes and that on the last named date he accompanied Rutter to this claim for the purpose of putting in corner stakes. The No. 2 East Fork claim was located with reference to No. 1 Bench on Moonlight—the westerly end line of the Rutter claim or No. 2 East Fork of Moonlight adjoining the easterly side line of No. 1 Bench Moonlight.

The witness was at the Northeast corner of No. 1 Bench Moonlight claim during the month of July, 1899, and there was a willow stake. It was blazed off with an axe, marked with a lead pencil "N. E. Corner Bench No. 1 Moonlight." It had no other marks on it. He was at this corner on the Moonlight Bench No. 1 claim about six weeks ago and that the corner of the claim is marked in the same place as it was marked in July, 1899. That in placing the Northwest corner stake of Bench No. 2 on Moonlight, or the Rutter claim, he was unable to see on account of the high bank the Northeast corner of the Moonlight Bench

Claim No. 1 and inadvertently got it over the line and on to the Moonlight Bench Claim No. 1. That he was acquainted with Andrew Jensen and saw Andrew Jensen working on No. 1 Bench Moonlight in 1899 at a point about one hundred and fifty feet from the Northwest corner stake of Bench No. 2 of the East Fork of Moonlight.

The plaintiffs' witness Jafet Lindeberg testified (Tr., p. 233):

That he has known the Bench No. 1 Moonlight Creek claim since 1899; that he is familiar with the claim as its boundaries are now marked and that to the best of his recollection the boundaries are the same now as they were at the time the plaintiff purchased the claim in 1903; that he knows Andrew Jensen who located the claim in January, 1899; that he saw Jensen working on this claim in 1899 and talked to him; that he saw Jensen working on this claim in the latter part of May, 1899. He was working close to the East line of the claim or about the middle as to the North and South of the claim as now marked. He was sinking a shaft; he had a conversation with him at that time; that he knows where the Northeast corner stake of the No. 2 Bench claim of the left fork of Moonlight is now situated on No. 1 Bench Moonlight. Jensen was sinking a shaft when he saw him in the Spring of 1899, possibly one hundred to one hundred and fifty feet from the line to the West or Northwest rather and Northeast of the Northerly end of Moonlight

claim. The shaft that he saw Jensen sinking was within the boundaries of Bench Claim No. 1 as it is now designated and marked.

The plaintiffs' witness Arthur Gibson testified (Tr., p. 207):

That he was a civil engineer and made plaintiffs' Exhibit "A" (Tr., p. 208); that he made the actual survey of Bench No. 1 on Moonlight on September 9, 1902 (Tr., p. 325); that he found willow stakes at the corners but no legible writing upon the stakes, the corners being identified by one C. L. Spanggard, a witness upon the location notice of Mr. Jensen, and also being one of the persons assisting Mr. Jensen in making the location on No. 1 Bench Moonlight.

VII.

THE DEFENDANT'S LOCATION WAS SUBSEQUENT TO THAT OF THE PLAINTIFF'S LOCATION AND NO RIGHTS WERE INITIATED BY ITS PRETENDED AMENDED LOCATION.

The location notice of the plaintiff's Bench No. 1 Moonlight claim is dated January 3, 1899, is witnessed by O. Schueler and C. L. Spanggard, and was recorded at 1:15 p. m. on January 17, 1899 (Tr., p. 227). The location notice of the defendant corporation's Grant claim is dated January 9, 1899, is witnessed by Andrew Jensen, the locator of the plaintiff's said claim and was recorded at 10:10 p. m. on January 17, 1899 (Tr., 228).

The plaintiff's witness Andrew Jensen testified (Tr., p. 215):

"I was acquainted with W. N. Grant (the locator of defendant corporation's claim). I assisted him in locating the (said defendant's) claim known as the Grant claim near Moonlight. I went over with him and showed him the two claims I had staked. I witnessed the location of his claim he staked at that time. Grant just put in one willow stake up by the side of one of mine on No. 6 Good Luck—on the upper part towards the mountain. As I remember it Grant's claim could not join Lyng's except possibly on one corner.

"Q. According to the location certificate of Bench Claim No. 1 Moonlight (plaintiff's claim) and the Grant claim, the said Grant claim was located six days after the location of Bench No. 1 Moonlight. Please state whether or not said Grant claim as located and marked on the ground at the time of its location, embraced within its exterior boundaries any of the ground as marked by you within the exterior boundaries of the Bench No. 1 Moonlight.

"A. It did not.

"Q. State whether or not the placer claim located by W. N. Grant on the 9th day of January, 1899, in any way or manner whatever, conflicted with the exterior boundaries of the Lyng claim or the Moonlight claim or with Bench No. 1 Moonlight?

"A. I know it could not conflict because Grant stated it with reference to the other claims and we

could see the stakes of the other claims. I recall fairly well the surface marks of the ground in the locality of Moonlight springs and fairly well recollect the surface conditions of that vicinity as it was represented in January, 1899. There was some flat ground between Grant's location stake and the base of Anvil mountain, but not a great deal. Then it ran up the side of Anvil mountain because I remember asking him why he wanted to stake the claim in that way and he said there might be some gold up in the mountain.

"Q. Please state whether or not at all the times you were the owner of said Bench No. 1 Moonlight claim you ever at any time claimed that the exterior boundaries of said Bench No. 1 Moonlight embraced or included any of the ground of the Bob Lyng or Moonlight claim, or the said Grant claim, as shown on Exhibit 'C' to this deposition?

"A. I never did.

"Q. Please carefully examine Exhibit 'C', the plat attached to these interrogatories, and state whether or not placer claims Bench No. 6 Below Good Luck, the Grant claim, the Lyng or Moonlight claim, No. 2 Moonlight or Lindblom claim and Bench No. 1 Moonlight, as shown on said map, approximately represent the relative original positions of said claims as staked and marked on the ground at the time they were located.

"A. They do not; not on that map. So far as I can see they are altogether wrong."

On cross-examination the witness Jensen testified (Tr., p. 218):

"Q. At about the time that you located the No. 1 Bench Moonlight did any one locate a claim immediately to the East of your said location, and if so, who?

"A. They did not because the Nelson claim was located East of Bench No. 1 on Moonlight when I located that claim. My Bench No. 1 Moonlight joined Nelson's claim on the Western side of the Nelson claim; they did not have any common corners. My upper stakes on Moonlight were higher towards the mountain than any of those. Nelson's claim was East of mine or Easterly. My claim joined his on the Western side. I don't think my Bench No. 1 Moonlight and the Bob Lyng or Moonlight claim had any common corners. My claim ran along the East side of his but further up towards Anvil mountain; extended further up towards Anvil mountain so they did not have any common corners. The Grant claim and my Bench No. 1 did not have any common corners. A part of the Grant claim might lie between the upper end of my Moonlight claim and the Anvil mountain. Grant placed one middle stake at one of my corners towards Anvil mountain on the upper side of No. 6 Goodluck. At the time I located No. 1 Bench Moonlight, I marked the claim on the ground by putting a stake in each corner; there were four stakes, I would say about four or five feet long and two or three inches in circumference. They were willow stakes. They were

marked with a lead pencil. I squared one side of them with an axe and marked them 'Bench No. 1 on Moonlight' and on one of them I put the location notice. I posted a location notice on one of the corner stakes by splitting it in the top and sticking the notice down. It was recorded in the recorder's office at Nome. I did find gold there when I was looking over the ground. I struck a piece of soft ground quite close to some willows and I dug down and took some dirt to the tent and washed it and found some gold. The discovery of gold that I found warranted me in further prospecting and developing said claim as a placer claim.

"Q. Did you subsequent to the location of Bench No. 1 Moonlight re-set the stakes or further mark the claim on the ground?

"A. I did not.

"Q. If you signed the notice of location made by W. N. Grant as a witness to said location notice, when, where and under what circumstances did you sign the same?

"A. Yes, I signed it right on the place where he put down the stakes when the location was made. I asked him why he wanted to stake the claim upon the side of the mountain and he said there might be gold there. Grant was the only one present, I remember, still Otto Schueler might have been there. The conversation was had right on the place where we put down the stake. I don't know where the exterior boundaries of the Grant claim were because he only put down one stake, he said that was enough. I did not at any time

abandon or intend to abandon any part or portion of the No. 1 Moonlight.

"Q. Did you at any time change the boundaries of said claim (Bench No. 1 Moonlight)?

"A. I never did.

"Q. Did the Grant claim at any time to your knowledge, overlap the No. 1 Bench Moonlight, if so, state when you first discovered such overlap, and to what extent it overlapped?

"A. It did not to my knowledge. I never discovered it because I left in the Fall of 1900.

"Q. By whom and how was your attention first called to any conflict between the Grant claim and the No. 1 Bench Moonlight? And what, if anything, did you do about it?

"A. About five years ago a representative of an eastern company came to my place in Buffalo, N. D., with a map something like the one I had before me and wanted me to give him the location of the Grant claim as near as I remembered it, and I told him all about it as near as I remembered it. I don't know who the man was. The first I ever heard of it was in a letter from my son Tom. The upper end stakes of my Bench No. 1 Moonlight were a little nearer to Anvil mountain than the upper end stakes of the Nelson or Carlson claim, they were up on the bench above the willows. The upper end stakes of my Bench No. 1 Moonlight were nearer to Anvil mountain than the stakes of the Moonlight or Lyng's claim. There were six inches to a foot and a half of snow in places when we staked Bench No. 1 Moonlight and also when the Grant claim was staked. The several claims

were staked in the daytime and I would say between ten and four o'clock. When the Grant claim was staked all the stakes of No. 6 Below Good Luck and also the upper stakes of Robert Lyng's on Moonlight and the two upper stakes of Bench No. 1 on Moonlight owned by me, were visible. At the time I staked Bench No. 1 Moonlight, as far as I remember, there was six stakes marking the Moonlight or Bob Lyng's claim. Only one stake marked the Grant claim at the time of its location. I don't know anything about the East Fork of Moonlight. My Bench No. 1 on Moonlight took in all the willows. There was not any willows between my stakes and the base of Anvil mountain; there were no willows on the Grant claim that I remember. There might have been a few, possible. There was some willows around the Moonlight springs and also a little above the springs, that is in a northwesterly direction toward the mountain. The willows were visible at the time of the location of these claims."

On re-direct this witness testified (Tr., p. 225):

"The first map I saw was from an eastern representative of an eastern firm who showed me a map and talked to me about the location of the Grant claim. The next was last August when Mr. Holt from Fargo, N. D., came to my place and showed me a map and wanted me to look it over and see if I thought it was nearly correct, and asked me to mark it on the map where those claims were originally located. I pointed out on the map

where I thought the claims were originally located, just about as I have marked it in my testimony. I told Mr. Holt the Grant claim looked to me to be too far East. It should have laid more to the West of its location as shown on the map Exhibit 'E' from Mr. Holt."

Said Exhibit "E" was marked Plaintiff's Exhibit "J" for identification and is similar to plaintiff's Exhibit "H" for illustration.

"Q. When was the last time that you were on any of the claims in the vicinity of Moonlight Springs, and what examination, if any, did you make of any of the placer claims in that vicinity?

"A. In September, 1900. I did not make any examination except I saw the stakes there."

The defendant's witness A. G. Kingsbury testified (Tr., p. 428), that in 1901 he made an amended location of the Grant claim, stating therein, among other things, that the same was made for the purpose of taking in overlapping ground in that locality and at that time he rebuilt the monuments of the claim, some *five* in number.

Witness being asked on cross-examination what his object was in filing the amended location answered:

"I do not know. It runs in my blood to do that.

"Q. On the theory that the more times you stake the less others will jump?

"A. Well, perhaps that is what prompted—

"Q. You followed that custom?

"A. I have done it a great many times.

"Q. In your amended location you state the purpose of it was to take in new ground in that locality?

"A. I suppose I was following some form that I thought an amended notice required" (Tr., p. 480).

This witness on his direct examination (Tr., p. 465), was asked the following question and made the following reply:

"Q. How did you know they were the Grant stakes?

"A. Because he (Grant) said they were and said he placed them there. I am familiar with the slopes of Anvil mountain and with what is known as the westerly face of the mountain, also the contour in that vicinity. With the terraces, it is a general incline from the northeastern end or corner of the Grant claim to the southeasterly end, sloping southwesterly to the southwesterly corner. Before the ground was disturbed in any way by mining, the Moonlight Springs was considered the base of Anvil mountain and from there easterly out toward Little Creek in a general way it was fairly level toward Little Creek roadhouse. There was not very much slope from there. There was some terraces or benches between the springs and the roadhouse. The only level ground on the Grant claim were the terraces or benches. The southwest end of the claim was covered with willows in 1899. On the southerly side of the claim the willows ex-

tended, I should say, three or four hundred feet and came down across to the center stake.

"Q. State whether or not any portion of the Grant claim took in any part of what is called the vale or valley, and if so what part of the claim?

"A. Well, it was kind of a low flat place where the Southwest corner was located. It extended off into the willows, I do not know how far but there was probably fifty feet or more of flat ground."

Undoubtedly the incentive for this pretended amended location was that in 1899 the witness Kingsbury and Grant "found some good colors of gold" half way between the present location of the railroad and the southeast corner "within the boundaries of the Grant claim as it is *now marked upon the ground*" (Tr., p. 431), and in 1900 "there was quite a little prospecting done, and work on the *southern end*" (Tr., p. 434), the part in controversy (Tr., p. 435); that the shaft sunk by Kingsbury in 1901 was within the ground in controversy (Tr., p. 437).

Under the guise of an "amended location" the witness Kingsbury, who was one of the organizers of the corporation defendant, financially interested therein, as well as being the agent thereof (Tr., p. 431), sought to make the mineral within the boundaries of the plaintiff's claim, the "discovery" within the defendant's Grant claim, the existence of which at the time of its location (Tr., p. 220) was conjectural as to the presence of mineral therein.

No adverse claim can be founded upon a discovery within a valid and subsisting location.

Swanson vs. *Sears,* 32 S. C. R., 455.

In the absence of actual discovery within its limits, the location of the Grant claim was void.

Erhardt vs. *Boaro,* 113 U. S., 527;
Larkin vs. *Upton,* 144 U. S., 19;
Kingsbury vs. *Amy Co.,* 152 U. S., 222;
Creede Co. vs.*Uinta Co.,* 196 U. S., 337;
Waterloo Co. vs. *Doe,* 56 Fed., 685;
Smith vs. *Newell,* 82 Fed., 56;
Walton vs. *Wild Goose Co.,* 123 Fed., 209;
Tuolumne Co. vs. *Maier,* 134 Cal., 558;
Chrisman vs. *Miller,* 140 Cal., 440;
McLemore vs. *Express Oil Co.,* 158 Cal., 558;
Ambergris Co. vs. *Day,* 12 Ida., 108;
Copper Globe Co., vs. *Allman,* 23 Utah, 410.

Jensen, the locator of the plaintiff's claim, states that his "discovery" was made in the willows on the upper part of the claim (Tr., pp. 215-220); that his claim took in all the willows (Tr., p. 224). There were no willows on the Grant claim that he remembers (Tr., p. 225).

The fact of the "discovery" as well as the physical character of the place at which the "discovery" was made, would naturally impress this upon the memory of the witness,

and flatly contradicts the statements of the witness Kingsbury as to the existence of willows upon the Grant claim (Tr., p. 466).

This line of willows is shown by the plaintiff's Exhibit "A" (Tr., p. 209) to be within the plaintiff's Bench Location before they were transplanted upon the Grant claim at the time of the said amended location. (See Tr., p. 465.)

This plat (Exhibit "A") was made from an actual survey made by Arthur Gibson, a civil engineer (Tr., p. 207), on September 9, 1902, from the monuments on the ground and their identification by Mr. Spanggard, one of the witnesses to the Bench No. 1 on Moonlight location (Tr., p. 325).

It is patent that the defendant corporation's Grant location and its boundary marks were simultaneously enlarged at the time of said pretended amended location.

VIII.

THE MEANING OF AN ADOPTED STATUTE IS SETTLED BY THE CONSTRUCTION PLACED UPON IT BY THE HIGHEST COURT OF THE ORIGINAL STATE PRIOR TO ITS ADOPTION AND IS NOT AFFECTED BY SUBSEQUENT DECISIONS OF THAT COURT.

When Congress adopts and puts in force in a territory the law of one of the states,—

James vs. *Appel,* 192 U. S., 129;
Sanger vs. *Flow,* 48 Fed., 152;

or where a state adopts a statute of another state, it also adopts the construction placed thereon by the courts of the latter state in decisions rendered before the adoption of the statute.

Cathcart vs. *Robinson,* 5 Peters, 280;
McDonald vs. *Hovey,* 110 U. S., 619;
Henrietta Co. vs. *Gardner,* 137 U. S., 123;
Stutsman vs. *Wallace,* 142 U. S., 293;
Robinson vs. *Belt,* 187 U. S., 41;
James vs. *Appel,* 192 U. S., 129;
Welch vs. *Barber Co.,* 167 Fed., 465;
Harrill vs. *Davis,* 168 Fed., 129;
Jennings vs. *Alaska Treadwell Co.,* 170 Fed., 146;
Tyler vs. *Tyler,* 19 Ill., 151;
Commonwealth vs. *Hartnell,* 69 Mass., 450;
Marqueze vs. *Caldwell,* 48 Miss., 23;
Lindley vs. *Davis,* 6 Mont., 433;
State vs. Robey, 8 Nev., 312;
Everding vs. *McGinn,* 23 Or., 53.

Subsequent decisions of the original state have no more weight in the adopting state than that to which they are entitled by reason of their intrinsic merit.

Cathcart vs. *Robinson,* 5 Peters, 280;
Hardenberg vs. *Ray,* 151 U. S., 112.

Hence, the rule that the legislature by adopting the statute of another state, thereby adopts the construction placed on said statute by the courts of that state, does not apply when such construction was *after* the adoption.

In re Heath, 144 U. S., 92;
Myers vs. *McGavock,* 39 Neb., 843;
Elias vs. *Territory,* 9 Ariz., 1;
Germania Co. vs. *Ross Lewin,* 24 Colo., 843;
Barnes vs. *Lynch,* 9 Okla., 11;
Wyoming Co. vs. *State,* 15 Wyo., 97.

By the Act of Congress of May 17, 1884, the Code of Civil Procedure of the State of Oregon was declared to be the law of Alaska so far as the same was applicable; and thereafter, when the Code of Civil Procedure of Alaska was adopted by the Act of June 6, 1900, it was taken from the laws of Oregon, both as to the provisions regulating the action of ejectment and prescribing the interest in real estate upon which the action may be brought, and the statute of limitations applicable to such actions.

Tyee Con. Mg. Co. vs. *Langstedt,* 136 Fed., 124.

The Act of Congress of June 6th, 1900, making further provision for a civil government for Alaska which provided that no action shall be maintained for the recovery of real property or for the recovery of the

possession thereof, unless it shall appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action did nothing more than re-enact and print in the statutes of the United States the Code of Civil Procedure of Alaska which had been in force in that territory since May 17, 1884, and was plainly intended to add nothing to what had previously existed under that statute.

Tyee Con. Mg. Co. vs. *Langstedt,* 137 Fed., 865,

except the meaning given by the Supreme Court of Oregon to Sec. 500 of the Oregon Code (which in substance is the same as Sec. 475 of the Alaska Code), in the cases of *Beale* vs. *Hite* and *Altschul* vs. *O'Neal,* decided by that Court during the year 1899 and reported in Vol. 35 of the Oregon reports.

It must be presumed that when Congress adopted the words of Sec. 500 of the Oregon Code as Sec. 475 of the Alaska Code, that it was familiar with the construction put upon that section by the highest court of that state and that it enacted in the statute of 1900 those words with the meaning which had been settled by the highest court of the State of Oregon.

McDonald vs. *Hovey,* 110 U. S., 619;
Allen vs. *Burke,* 120 U. S., 619;
Brown vs. *Walker,* 161 U. S., 591;

Warner vs. *Texas,* 164 U. S., 418;
Robinson vs. *Belt,* 187 U. S., 41;
The Devonshire, 13 Fed., 39;
Kohn vs. *McKinnon,* 90 Fed., 624;
Peterman vs. *N. P. R. Co.,* 135 Fed., 335;
Commonwealth vs. *Hartnell,* 3 Gray, 430;
Scruggs vs. *Blair,* 44 Miss., 406;
Gould vs. *Wise,* 18 Nev., 253;
Weisner vs. *Zann,* 39 Wis., 188.

See also:

U. S. vs. *Falk,* 204 U. S., 143;
36 *Cyc.,* p. 1153, note 73.

The case of *Beale* vs. *Hite,* 35 Or., 126 (decided on May 29th, 1899), involved the question of adverse possession of unpatented non-mineral land. The Court held that such land could not be held adversely while the occupant admits the title thereto to be in the United States.

The still later case of *Altschul* vs. *O'Neil,* 35 Or., 202 (decided on August 7, 1899), is to the same effect.

This construction of the Oregon statute being prior in time to the re-enactment of 1900, must, under the authorities cited, be presumed to have been adopted by Congress as a part of said Act.

It also formed the basis of the decisions in the cases of—

Tyee Mining Co. vs. *Langstedt,* 136 Fed., 124;
Tyee Mining Co. vs. *Jennings,* 137 Fed., 864.

Both of these cases involved the question of adverse possession of unpatented mineral land within the district of Alaska and in each case the Court referred to and approved the meaning of Sec. 500 of the Oregon Statute as enunciated by the Supreme Court of that State.

In the case of

Tyee Mining Co. vs. *Langstedt,*

the Court, referring to the case of *Beale* vs. *Hite,* said:

> "It was (therein) held that to constitute adverse possession there must be, among other requisites, an entry under claim of title hostile to the true owner and to the world, and that an occupant of land can not hold adversely while he admits the title to be in the United States, thus adopting the doctrine of *Ward* vs. *Cochran,* 150 U. S., 597; *Henschall* vs. *Bissill,* 18 Wall., 255; *Bracken* vs. *U. P. R. Co.,* 75 Fed., 347, and *Pillow* vs. *Roberts,* 13 How., 472; in which it was said that possession to be adverse, must be adverse to all the world."

In the course of the opinion in the *Tyee-Langstedt* case, the Court said that there was much conflict of authority as to when the statute of limitations begins to run against the entryman of public lands, but

"In cases where the question has been presented

for adjudication, the courts have uniformly held that *the statute of limitations does not begin to run against the claimant of a mining claim before his patent issues.*"

This was based upon the principles that while the title to the ground remained in the United States, no state statute of limitations could confer a right which would interfere with the primary disposal of the soil;

See—

Redfield vs. *Parks,* 132 U. S., 244;
Gibson vs. *Choteau,* 13 Wall., 92,

and that the statute of limitations of actions, as enacted by the legislatures of the different states are steadfastly followed by the courts of the United States as rules of decision in cases where they apply.

Hanchett vs. *Blair,* 100 Fed., 826.

Some nine years after the decision of *Beale* vs. *Hite* and *Altschul* vs. *O'Neil* (which were decided in 1899), the Supreme Court of Oregon in *Boe* vs. *Arnold,* 58 Or., 52, overruled and receded from the doctrine enunciated in *Beale* vs. *Hite, Altschul* vs. *O'Neil* and *Altschul* vs. *Clark.* This latter ruling was followed by this Court in the case of *Eastern Land Co.* vs. *Brosnan,* 173 Fed., 67, under the familiar rule that in construing state statutes the Federal courts follow the construction adopted by the state courts.

Bacher vs. Cheshire, 125 U. S., 555;
Dixon Co. vs. *Paul,* 167 Fed., 784.

"A careful consideration of *Boe* vs. *Arnold,* will show that the Court decided the case first on the question of estoppel and simply receded from the erroneous position taken by that Court in prior decisions where it held that until patent had issued there could be no adverse possession, even under a grant in *praesenti,* so long as the party in possession recognizes the title of the United States. The United States cases cited and relied upon in this decision very clearly show that the case of *Boe* vs. *Arnold* does not conflict in any way with the Tyee case."

Opinion (Tr., p. 105).

which points the distinction between the rights flowing to an entryman under the general land laws and those to a claimant under the mining law. *Boe* vs. *Arnold* follows the rule laid down by the Supreme Court of the United States that when, in case of a grant *in praesenti,* the grant has been complied with and fully earned the title has attached. That adverse possession continued for the statutory period will bar the right of the grantor to the property so held. This, notwithstanding want of final certificate and the issuance of patent. This does not militate against the doctrine of the Tyee cases and the unbroken line of authorities in harmony therewith, that, until the Gov-

ernment is divested of its title, there can be no running of the statute of limitations.

Boe vs. *Arnold* is not in point because of the dissimilarity of its facts with those of the case at bar, and it was decided many years after the re-enactment of the Alaskan Codes. Furthermore, the case at bar comes up from Alaska and not from Oregon, as did the Eastern Land-Brosnan case, and, for the foregoing reasons, is not binding upon this Court in this case.

IX.

ADVERSE POSSESSION IS NOT SHOWN IN DEFENDANT CORPORATION.

Sec. 1042 of Carter's Alaska Codes (Approved June 6, 1900), provides that an uninterrupted, adverse, notorious possession of real property, under color and claim of title for seven years or more shall conclusively be presumed to give title, except as against the United States.

See

Tyee Con. Co. vs. *Langstedt,* 136 Fed., 709;
Altschul vs. *O'Neil,* 35 Or., 221.

Sec. 4 of Carter's Alaska Codes limits actions to recover real property to a period of ten years before commencement of the action.

In *Altschul* vs. *O'Neil,* the Court said:

"This Court has established the rule that the holding must be exclusive, for in *Joy* vs. *Stump* (14 Or., 361), it is said that 'When a person relies upon naked possession as the foundation for an adverse claim, . . . such possession must not only be actual, but also visible, continuous, notorious, distinct and hostile, and of such a character as to indicate exclusive ownership in the occupant. See also, *Hicklin* vs. *McClear,* 18 Or., 126.

"The proposition is broadly stated in 1 *Am. & Eng. Ency. Law* (2d Ed.), 834, that the possession to be effectual, must be exclusive, not only of the owner, but of all other persons. And in a comparatively recent case in the United States Supreme Court it was held, after a special reference to many authorities, that a possession in participation with the owner or others could not be exclusive. *Ward* vs. *Cochran,* 150 U. S., 597. See also, *Bracken* vs. *U. P. R. Co.,* 73 Fed., 347."

See also

Sharon vs. *Tucker,* 144 U. S., 533;
Lowndes vs. *Huntington,* 153 U. S., 31;
Tyee Con. Co. vs. *Langstedt,* 121 Fed., 709.

If evidence as to one or more elements that go to make up a title by adverse possession is wanting, the party claiming by virtue of the statute has no title thereto.

Herbert vs. *Hanrick,* 16 Ala., 120;

Unger vs. *Mooney,* 63 Cal., 586;
DeHaven vs. *Landell,* 31 Pa. St., 120.

"The possession of the defendant in error was not adverse, and did not amount to *disseisen* of the plaintiff in error or its grantors. It was actual, open, notorious and continuous, with a claim of ownership but it lacked two essential requisites. It was not shown to be either exclusive or hostile. The possession not being adverse the statute of limitations never began to run."

Tyee Con. Co. vs. *Langstedt,* 121 Fed., 709.

Possession and working of a portion of all under claim of ownership of all, is a constructive possession of all, if the remainder is not in adverse possession of another.

Smith vs. *Gale,* 144 U. S., 509.

Possession not actual but constructive, not exclusive but in participation with the owner or others, falls short of that kind of adverse possession which deprives the true owner of his title.

Ward vs. *Cochran,* 150 U. S., 597;
Altschul vs. *O'Neil,* 35 Or., 221;
Tyee Con. Co. vs. *Langstedt,* 136 Fed., 124.

The law presumes that when title is shown the true owner is in possession until adverse possession is proved to begin.

Lamb vs. *Burbank,* 14 Fed. Cas., 8012;
Altschul vs. *O'Neil,* 35 Or., 202.

And where two persons are in mixed possession of the same land, one by title and the other by wrong, the law considers the one who has the title as in possession to the extent of his right as to preclude the other from taking advantage of the statute of limitations.

Cheney vs. *Ringold,* 2 Harr. & J. (Md.), 75.

It is shown by the testimony of the defendant that the plaintiff "went on the claim in the absence of myself" (W. H. Bard, the attorney for the defendant corporation, from June, 1903, to June, 1906, Tr., p. 578), "and did some assessment work" (Tr., p. 580).

It is shown by the plaintiff's testimony that the plaintiff was in the possession and engaged in mining work upon said claim in the year 1902 (Tr., p. 278) and 1903 (Tr., p. 300), 1904 (Tr., pp. 282, 284, 285), 1905, 1906, 1907 (Tr., pp. 286, 287, 289), 1908 (Tr., p. 291), 1909 (Tr., pp. 270, 292), and 1910 (Tr., pp. 274, 293).

The defendants introduced in evidence affidavits of labor upon the Grant claim for the years 1900-1903, 1906 to 1910 (Tr., pp. 619-635). And it further appears that in the winter of 1903 and 1904 there were some men working upon the ground in dispute for the defendants and that they were told by an officer

of the plaintiff to "vacate, that we owned the premises. They said they were not doing much, they were just prospecting" (Tr., p. 581).

In 1905, Bard, the agent of the defendant corporation, being found on the ground engaged in prospecting, was ordered off the premises (Tr., p. 288).

In the latter part of October, 1910, the lessee of the corporation defendant, was told by a representative of the plaintiff that "we had the older title, and " I would try to stop him if he went to work (upon " the disputed ground), as we had the older title" (Tr., p. 770).

It is clear that the defendants' possession was neither exclusive nor uninterrupted for the period required by the statute to vest title in the corporation defendant.

It is immaterial whether or not this work was done within the disputed territory as entry by the true owner on part is constructive possession of the whole.

Barr vs. *Gratz,* 4 Wheat., 213.

See

Empire State Co. vs. *Bunker Hill Co.,* 121 Fed., 977;
Hess vs. *Winder,* 30 Cal., 349;
Stone vs. *Perkins,* 217 Mo., 586.

The defendants' affidavits of labor have no tendency to prove any adverse possession in defendant corporation. They do not show upon their face that

such work was done upon the disputed premises and if they, or oral testimony in their aid, did so show, such assessment work would, under the facts of this case, be merely evidence of acts of trespass upon defendants' part and in no way affect the title of the plaintiff to the ground in dispute.

Defendants are trespassers—mere intruders upon plaintiffs' lawful possession. Having no right to enter upon that possession they could initiate no right in themselves by overlapping the plaintiffs' location and making annual or other expenditure thereon. Having no right of entry their re-location or overlapping of plaintiffs' claim was void *ab initio.*

Belk vs. *Meagher,* 104 U. S., 279;
McKinley Creek Co. vs. *Alaska United Co.,* 183 U. S., 572;
Aurora Hill Co. vs. *85 Mg. Co.,* 34 Fed., 515;
Book vs. *Justice Co.,* 58 Fed., 106;
Fee vs. *Durham,* 121 Fed., 469;
Zerris vs. *Vanina,* 134 Fed., 615;
Horsewell vs. *Ruiz,* 67 Cal., 112;
Souter vs. *McGuire,* 98 Cal., 545;
Sullivan vs. *Sharp,* 33 Colo., 348;
Peoria Co. vs. *Turner,* 20 Colo., A. 479;
Street vs. *Delta Co.,* 42 Mont., 371;
Overman Co. vs. *American Co.,* 7 Nev., 312.

Two persons can not at the same time hold possession of the same piece of property and it is settled law

that an entry on land by one having the right has the same effect in arresting progress of the statute of limitations (or the statute relating to prescription) as a suit.

Henderson vs. *Griffin,* 5 Peters, 151.

Where there is a breach in the continuity of the possession, the possession before and after the breach can not be connected.

Brown vs. *Hanquer,* 48 Ark., 277.

In general when there is no adverse possession there is no *disseisin,* and until *disseisin* the statute of limitations of Alaska could not run against non-mineral land.

U. S. vs. *Arredondo,* 6 Peters, 689.

And evidence of possession by the plaintiff for seven years is immaterial where the plaintiff, as in the case at bar, claimed under a valid location, which is not seriously disputed by the defendants.

Upton vs. *Santa Rita Co.,* 14 New Mex., 96.

There is some evidence to the effect that a cabin was maintained upon the disputed premises by the defendants herein, but not of its continuous occupancy.

"If one who claims title under a deed to a large tract of land, enters upon it and erects a house

and acquires actual possession of a small part around his house and constructive possession of the whole and the owner of the true title afterwards enters on the same tract in another place, claiming the whole, the constructive possession thus acquired by the owner who first entered is overcome by the constructive possession of the true owner so that the statute of limitations does not run in favor of the one who has not the true title."

Semple vs. *Cook,* 50 Cal., 26.

X.

THE DEFENDANTS' ALLEGED TITLE BY PRESCRIPTION IS WITHOUT GROUND TO SUPPORT IT.

The location claimed by the defendant corporation was made with the assistance of the plaintiff's locator (Tr., p. 220), some six days after the location of the plaintiff's claim (Tr., pp. 227, 228) without any intention upon his part to abandon any portion of the latter claim (Tr., p. 221).

It is inherently impossible that the plaintiff's senior location could "overlap" the corporation defendant's junior location as claimed by it in its Amended Answer (Tr., p. 25, par. 2).

The testimony shows that the locator of the plaintiff's claim who assisted in making the defendant's junior location did not know of any overlap at the time of making the plaintiff's senior location (Tr., p. 221).

It appears that at the time the junior location was laid on the ground only one stake marked its boundaries (Tr., p. 221), but that in 1901 an amended location of said junior location was made (Tr., p. 437), and the corner monuments enlarged (Tr., p. 436), possibly swung on to the plaintiff's location, thus creating the overlap.

> "The right of location upon the mineral lands of the United States is a privilege granted by Congress but it can only be exercised within the limits prescribed by the grant. A location can only be made when the law allows it to be done."
>
> *Belk* vs. *Meagher,* 104 U. S., 279.

Prescription rests upon presumption of a grant, and no prescription can have a legal origin where no grant could be made to support it.

> *Belk* vs. *Meagher,* 104 U. S., 279;
> *Home* vs. *Rogue River Co.,* 51 Or., 233.

To acquire title by prescription the possession of the property must not only be hostile to plaintiff's title but must be exclusive, continuous and uninterrupted for the statutory period. Any interruption of the adverse possession within that time prevents the acquisition of title by prescription.

> *Carter's Alaska Code,* Sec. 1042;
> *Big Three Mg. Co.* vs. *Hamilton,* 147 Cal., 130.

That the defendant corporation did not have the statutory possession is demonstrated in another part of this brief. And even if it did, as the defendant corporation had not placed itself in a position to avail itself of the benefits of the statute of limitations and was evidently not acting in good faith, its possession would not ripen into full title against the plaintiff.

Iowa Land Co. vs. *Blumer,* 206 U. S., 482.

As between a prior and subsequent locator of the same ground the courts will view the evidence tending to establish the senior locator's rights in the most favorable light. Such evidence will reasonably justify.

Ambergris Co. vs. *Day,* 12 Ida., 108.

The location of the defendant's claim was void *ab initio:* 1. Because the ground within the overlap was not open to location. 2. Because only one stake was used to mark the claim and no discovery was made at the time of location.

An amended location can not interfere with the rights of others acquired before the time of making the original location and the amendment.

Street vs. *Delta Co.,* 42 Mont., 371.

At the time of the location of the plaintiff's claim there was no conflict with the defendant's claim (Tr., pp. 212, 214, 215, 217, 218, 221), and the rights of the

parties are limited to such ground as was originally located by each.

Overman vs. *American Co.*, 7 Nev., 213.

A scrambling possession is not sufficient to raise the bar of the statute of limitations. It must have extended over the disputed part for the full period.

White vs. *Bunty*, 24 How., 235;
Brownville vs. *Carogos*, 100 U. S., 138;
Hamilton vs. *Sou. Nev. Co.*, 33 Fed,. 562.

XI.

THE STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF A FOREIGN CORPORATION WHICH DOES NOT DESIGNATE AN AGENT UPON WHOM PROCESS MIGHT BE HAD IN ITS BEHALF AS REQUIRED BY THE LAWS OF THE STATE OF ITS ADOPTION.

Sec. 225 of Carter's Alaska Codes provides that—

"All corporations or joint stock companies under the laws of the United States, or the laws of any State or Territory of the United States, shall, before doing business within the district, file in the office of the Clerk of the District Court for the Division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the President and Secretary of such corporation, and attested to by a majority of its

board of directors, showing the name of such corporation and the location of its principal office or place of business within the district, and if it is to have any place of business or principal office within the district, the location thereof, together with a statement of its financial condition.

"Such corporation or joint stock company shall also file at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its President, Vice-President, or other acting head, and its Secretary, if there be one, certifying that the corporation has consented to be sued in the Courts of the District upon all causes of action arising against it in the district, and that service of process may be made upon some person, a resident of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent so residing at the principal place of business of such corporation or company in the district."

Sec. 226 provides for the filing of the written consent of the person so designated.

Sec. 231 provides that—

"If any such corporation or company shall fail to comply with any of the provisions of this chapter all its contracts with citizens of the district shall be void as to the corporation or company and no court of the district or of the United States

shall enforce the same in favor of the corporation or company so failing."

This action was commenced on November 7, 1910 (Tr., p. 5). It is alleged in the complaint (Tr., 2) and admitted in the separate Amended Answers of the defendants (Tr., p. 25, Tr., p. 45), that the defendant, the Pacific Coal & Transportation Company, "is now and during all the times hereinafter mentioned, it was a corporation duly organized, created and existing under the laws of the State of Maine, doing business in the District of Alaska" (Tr., p. 2).

The defendants pleaded the statute of limitations (Tr., p. 36, par. 2; Tr., p. 57, par. 2). This plea was controverted by the plaintiffs' Reply (Tr., p. 79, par. 5; Tr., p. 85, par. 5), which further alleged "that the " defendant corporation had not prior to February 8th, " 1904, filed its articles of incorporation or designated " an agent within the District of Alaska, or at all, " upon whom service of process might be had, nor " since the year 1907 had it filed any annual statement " as required by the laws of the District of Alaska. " That for more than one year preceding the com- " mencement of this suit said corporation defendant " had no agent or officer or representative resident " or within the district of Alaska, upon whom process " might be had."

That the defendant corporation claims title to the " alleged Grant claim from the Corwin Trading Com-

"pany, a foreign corporation organized under the "laws of the State of New Hampshire" (Tr., p. 79; Tr., pp. 85-86).

These allegations in the reply are fully sustained in the evidence (Tr., pp. 750-752).

The burden of proof was upon the defendant corporation in order to avail itself of the statute of limitations to show by pleading and proof that it and its said grantor had severally complied with the laws of the District of Alaska relating to the designation, by a foreign corporation of an agent residing therein upon whom service of process might be had.

Taylor vs. *U. P. R. Co.*, 123 Fed., 155;
Black vs. *Vermont Marble Co.*, 1 Cal. A., 718.

"To entitle a corporation to the benefit of the statute of limitations of a state other than its creation it must affirmatively appear that it maintained an agent upon whom service of process could be made within the State whose statute of limitations ran and barred the cause of action. No such allegation appears in the answer in this case, nor does it appear from the plaintiffs' petition. . . . The mere fact that it operated its line of railroad (continuously during said period) will not warrant the Court in inferring that it maintained in the State of Iowa during all of said period an agent upon whom process could be made. That is a question of fact to be submitted to the jury (*Express Co.* vs. *Ware*, 20 Wall., 543), and should be pleaded to give the party the benefit of the statute. While

the presumption may exist that the corporation organized under the laws of a given State has a legal habitation there, and that service of process could be made within that State, no such presumption arises as to foreign corporations."

Taylor vs. *U. P. R. Co.,* 123 Fed., 155.

"A statute of limitations as against a foreign corporation begins to run from the time such corporation has a person within the State upon whom process to commence a suit may be served."

Express Co. vs. *Ware,* 20 Wall., 543.

"If under the laws of the domestic state the corporation has placed itself in such position that it may be served with process, it may avail itself of the statute of limitations when sued. Ability to obtain service of process is the test of the running of the statute of limitations."

Volivar vs. *Cedar Works,* 152 N. C., 656.

"Under such circumstances the defendant is not a non-resident within the meaning of the statute of limitations."

Sidway vs. *Land Co.,* 187 Mo., 649.

Where "a full and perfect judgment" can not be obtained, a different rule applies.

Tioga Co. vs. *Blosberh,* 20 Wall., 137.

Under the authorities cited it follows that a foreign

corporation which does not comply with the laws of the State within which it is operating relating to the appointment of an agent therein upon whom process might be served, is not entitled to the bar of the statute of limitations. It has no existence within the latter State and its courts have not complete jurisdiction over it.

The evidence shows that the corporation defendant deraigned title to its Grant claim from the Corwin Trading Company, a New Hampshire corporation (Tr., p. 750) by a conveyance bearing date August 8, 1901 (Tr., pp. 433-434). This latter corporation never filed its articles of incorporation, designation of agent upon whom process might be had or any corporate statement as required by the laws of Alaska (Tr., p. 750).

This eliminates the corporation defendant's grantor, said Corwin Trading Company, as an element in its claim of adverse possession.

The evidence shows that the corporation defendant was incorporated under the laws of the State of Maine on July 26, 1901 (Tr., p. 759), and first filed its articles of incorporation and designation or appointment of W. H. Bard, as its resident agent upon whom service of process might be had, on February 8, 1904, and its corporate statement on June 4, 1904 (Tr., p. 751). It was, therefore, at this last mentioned day that the statute of limitations could first commence to run in its favor.

On February 18, 1907, said Bard was succeeded by John T. Reed, as the statutory agent of the corporation defendant (Tr., p. 755).

Both Bard and Reed left Alaska in the year 1909 (Tr., p. 616) and since that time the corporation defendant has failed to appoint a statutory agent within that district.

It thus appears that the corporation defendant first fully complied with the Alaskan laws affecting foreign corporations on June 4, 1904, and that it maintained the statutory agency until say probably end of the year 1909, or in other words, for say four and one-half years. This falls far short of the seven years' time for the running of the statute of limitations of the District of Alaska, assuming that it ran at all.

By positive statute the corporation defendant was required to continually keep an agent upon whom service could at all times be obtained and as it failed to do so as above noted, it can not claim the benefit of the statute.

If we have misconstrued the effect of Sec. 1042 of the Alaskan Code in this—that it does not form the foundation for the claim of adverse possession by a foreign corporation doing business within that district and there is no "special statute governing Alaska denying a foreign corporation within the District of Alaska the right to plead the statute of limitations," as stated by counsel for applleants, it does not follow, as contended by them, "that a foreign corporation has

" the same right to all defenses in Alaska as any other " person may have, and no distinction is made under " the law."

Sec. 15 of *Carter's Alaska Codes,* p. 147, declares that:

> "If when the cause of action shall accrue against any person who shall be out of the district or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the district, or the time of his concealment, and if, after such cause of action shall have accrued, such person shall depart from and reside out of this district, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."
>
> "The next question discussed in this case is that raised upon the statute of limitations, the defendant pleading an adverse possession in itself for over five years, but we are satisfied this defense is entirely unavailing to the defendant, it being a foreign corporation and hence not entitled to plead the statute. It having no existence within this State, and the courts not having complete jurisdiction over it, is barred within the provisions of Sec. 21 (Nevadan) statute, which declares: 'If when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State; and if after the cause of action shall have accrued, he depart the State, the

time of his absence shall not be part of the time limited for the commencement of the action.' *That foreign corporations, which may never have had a legal existence within the State, are included within exceptions or statutes of this kind, is a question now very firmly settled by the authorities* (Italics ours). Thus in the case of *Olcott* vs. *Tioga R. R. Co.,* 20 N. Y., 210, the Court of Appeals upon a very thorough consideration of the question, and full examination of authorities, came to the conclusion that a foreign corporation came within the provisions of a statute similar to ours, and hence could not avail itself of the bar of the statute."

Robinson vs. *Imperial Co.,* 5 Nev., 45,

cited and approved in

Barstow vs. *Union Con. Co.,* 10 Nev., 386,
Hanchett vs. *Blair,* 100 Fed.

"It may be stated as a general rule that foreign corporations may, by comity only, transact business in States other than the one by virtue of the laws of which they exist. They are, therefore, citizens, so to speak, of the State by whose laws they are created, and, except by comity, have no legal existence elsewhere, and secondly, they in principle, come within the provisions of those statutes which make a saving as to absent debtors in favor of whom, so long as they remain under the jurisdiction of the State, the law of limitations does not run. *Wood on Limitations,* Sec. 250."

O'Brien vs. *Big Casino Gold Mg. Co.* (Cal.), 99 Pac., 210;
Pierce vs. *Sou. Pac. Co.,* 120 Cal., 163.

The reasoning of those decisions is in no way overcome by appellants' argument and it will be seen that the provisions of the Alaskan Code are substantially similar to those of the Nevadan law. Substituted service can certainly not be an element of adverse possession. There is nothing in the evidence to show that he did not give such notice, nor can it be presumed that the Clerk of the Alaskan court failed to notify the corporation defendant of the removal of its statutory agent in 1909 as required by Sec. 366 of the Alaskan Code.

We submit that it was the duty of the corporation to maintain such statutory agency under the Alaskan Law at all events. Failing to do so it can not now avail itself of the statute of limitations under the Alaskan law, nor can it do so under the line of decisions above set forth.

XII.

NO ESTOPPEL IN PAIS HAS BEEN SHOWN TO EXIST.

The foundation of equitable estoppel is equity and good conscience.

Pomeroy Eq. Jur., par. 802.

There is a class of cases where fraudulent conduct

is essential to cases in which an owner of land is precluded from asserting his legal title by reason of intentional false representations or concealments by which another has been induced to deal with the land.

Because the doctrine is opposed to the letter of the statute of frauds, it should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity.

Pomeroy Eq. Jur., par. 807;
Storrs vs. *Barber,* 6 Johns Ch., 616.

It is an effort to turn the legal owner into a trustee *ex delicto* by mere words and conjecture.

The conduct must first amount to fraud in contemplation of equity as against mere silence; the record of the title would be sufficient means of knowledge on part of defendant.

There is no rule of law or equity by which an owner through mere negligence can be divested of his legal title. The conduct must be relied on and be an inducement for the other party acting, and having acted, changed his position for the worse.

Pomeroy Eq. Jur., par. 821.

Estoppel *in pais* does not arise from the conduct of silence of one party to a transaction where the other party was not misled and suffered no injury.

Columbus Co. App., 109 Fed., 177.

Even false representations to work an estoppel must be of a nature to lead a reasonably prudent person to the action taken, and must have been acted on in good faith and on ignorance of the truth.

Davis vs. *Pryor,* 112 Fed., 274.

Facts to constitute equitable estoppel must be proven with particularity and precision and nothing can be supplied by inference or intendment.

Standard Sanitary Co. vs. *Arrott,* 135 Fed., 750.

An examination of the record in this case shows that no estoppel *in pais* has been sufficiently pleaded or proved.

No change of position by the defendants can be attributed to any inaction upon the part of the plaintiff.

The record shows that the plaintiff's location was duly monumented at the time of its location (Tr., p. 216), and that its boundaries so made were preserved (Tr., p. 233).

The defendants were bound to know the boundaries of the location under which they claim.

Ricketts on Mines, Sec. 85.

> The defendants had knowledge, or the means of knowledge, of the boundary line between the senior location and their own junior location. An intentional omission, however, to exercise care to ascertain such elements for the purpose of main-

taining ignorance regarding them and trespassing upon them, or a reckless disregard of them is fatal to the claim of a trespasser who invokes, as do these defendants, the claim of laches herein.

Resurrection Gold Mg. Co. vs. *Fortune Gold Mg. Co.,* 129 Fed., 68.

"It is the duty of every one to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and the jury may legally infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right and to appropriate the property to his own use from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them."

Durant Mg. Co. vs. *Percy Cons. Mg. Co.,* 93 Fed., 166, and authorities cited.

Now every trespass on the land of another that is not wilful and intentional, necessarily implies some degree of negligence.

Coal Co. vs. *McMillan,* 49 Md., 549.

And the rule which makes the negligent failure to discover the line of the property trespassed upon, conclusive evidence of intentional trespass, removes all room for the defense of inadvertence and honest mistake and negatives the claim of estoppel.

XIII.

LACHES AND STALE DEMANDS CAN NOT BE SET UP AS AGAINST THE LEGAL OWNER IN POSSESSION.

We fail to discover any elements of laches in this case. It has been repeatedly stated by the Federal authorities that:

> "Laches does not, like limitation, grow out of the mere passage of time. It is founded upon the inequity of permitting the claim to be enforced,—and inequity founded upon some change in the condition or relations of the property or parties. *Galliher* vs. *Cadwell,* 145 U. S., 368. The length of time during which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to arbitrary rule. It is an equitable defense, controlled by equitable considerations; and the lapse of time must be so great, and the relations of the defendants to these rights such, that it will be inequitable to permit the plaintiff to now assert them. *Alsop* vs. *Riker,* 155 U. S., 461."

Hanchett vs. *Blair,* 100 Fed., 827.

"Thus, inequity," says Judge Morrow, speaking for the Court in the case last cited, "has been often held to arise from changed value of property during the time elapsing from the date of the transactions which are the subject of the suit, or from the changed relations of the parties to the property,

as when a sale has taken place, and new rights have arisen. *Hubbard* vs. *Trust Co.,* 30 C. C. A., 520, 528; 87 Fed., 51; *Bartlett* vs. *Ambrose,* 24 C. C. A., 397, 399; 78 Fed., 839. The present case is not one of the class where the value of the property has arisen greatly, or even perceptibly, while the complainant remained in reposal nor is it one where new rights have arisen, as it has not been proved that a sale has taken place to the defendant Hanchett. Each case of laches depends upon its own circumstances, and in the case at bar the complainants in action does not appear to have worked injury to anyone; nor is it shown that there was any occasion for more promptly asserting his rights."

"If the complainant's title is a legal one, capable of being established at law, the doctrine of laches and stale claim does not apply."

Higgins Oil & Fuel Co. vs. *Snow,* 113 Fed., 436.

In *Rukman* vs. *Cory,* 129 U. S., 387, the Court said:

"Laches, the Supreme Court of Illinois has well said, can not be imputed to one in the peaceable possession of land for delay in resorting to a court of equity to correct a mistake in a description of the premises in one of the conveyances through which the title must be deduced. The possession is noticed to all of the possessor's equitable rights and he needs to assert them only when he may find occasion to do so. *Wilson* vs. *Byers,*

77 Ill., 76, 84. See also *Barbour* vs. *Whitlock,* 4 T. B. Mon., 180, 195; *May* vs. *Fenton,* 7 J. J. Marsh, 306, 309."

It is respectfully submitted that the defendants herein have neither legal nor equitable right to the premises in controversy and that the judgment of the trial Court should be affirmed.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PACIFIC COAL AND TRANSPORTATION COMPANY, a corporation, and M. D. McCUMBER,
Appellants,
vs.
PIONEER MINING COMPANY, a corporation,
Appellee.

No. 2150

SUPPLEMENTAL BRIEF FOR APPELLEE.

STATEMENT.

In addition to the matters stated in our Opening Brief relative to the jurisdiction of the trial Court, we beg to submit the following additional point which, because of the limited time allowed for the preparation of Appellee's Brief herein, was omitted therefrom.

ARGUMENT.

A COURT OF GENERAL JURISDICTION ACTING WITHIN THE SCOPE OF ITS AUTHORITY IS PRESUMED TO ACT RIGHTLY AND TO HAVE JURISDICTION TO RENDER THE JUDGMENT IT PRONOUNCES UNTIL THE CONTRARY APPEARS.

The record in the case at bar shows that the Court denied the defendant's motion for trial to a jury before the separate amended answers of the defendants were filed herein. The record does not contain the original answers of the defendants. *Non constat* the judgment of the lower Court upon the question of a jury trial, was based upon the allegations of said answers upon which the record on appeal herein is *silent.*

The District Court of Alaska which rendered the judgment herein, is a Court of general jurisdiction.

> Part III, Chap. 1, Sec. 4, *Carters' Ann. Codes of Alaska.*

> "Inasmuch as the District Courts of Alaska are Courts of general jurisdiction, our determination of the point must be guided by those usual rules which in the absence of a showing to the contrary, presume that courts have proceeded within the general scope of their powers, and that their orders and judgments have been given with authority."

> *Nelson* vs. *Meehan,* 155 Fed., 1-5.

And the general rule is that nothing shall be intended to be out of the jurisdiction of courts of superior jurisdiction, but that which appears especially to be; that such courts of record need not affirmatively show jurisdiction, and when *silent* upon the point, every intendment is in favor of their jurisdiction and of the regularity of their proceedings.

Ency. Pl. & Pr., Vol. 12, p. 173-201;
Freemont on Judgments, Sec. 124;
Black on Judgments, Sec. 271;
Galpin vs. *Page,* 18 Wall. U. S., 350;
Matter of Eichoff, 101 Cal., 600;
Hersey vs. *Walsh,* 38 N. W., 613;
Balbridge vs. *Penland,* 4 S. W., 565;
Gullickson vs. *Bodkin,* 82 N. W., 783.

Says Mr. Justice Field of the Supreme Court of the United States (*Galpin* vs. *Page, supra,* quoted from pages 565-6):

"It is undoubtedly true that a Superior Court of general jurisdiction presiding within the general scope of its powers, is presumed to act rightly. All intendments of law in such case are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not alone of the cause or subject matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will

be determined by the law creating the court or prescribing its general powers. . . . But the presumptions that the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed."

See, also,

Cuddy, Pet'n., 131 U. S., 285.

It is said that a judgment of a court of competent jurisdiction is always presumed to be right, and the party alleging error in the court below, must show it in the regular way in the *record,* or the presumption in favor of the correctness of the judgment will prevail.

Black on Judgments, Sec. 288;
Nelson vs. *Meehan,* 155 Fed., 1-5;
Hannan vs. *City of Lynchburg,* 33 Gratt. (Va.), 37;
Wright vs. *Smith,* 81 Va., 777;
Wynn vs. *Henniger,* 82 Va., 172;
McGirk vs. *Chauvin,* 3 Mo., 237.

In the case of *Fowler* vs. *Equitable Trust Co.,* 131 U. S., 348, upon the rendition of a decree, a petition in motion for re-hearing was filed. At the succeeding term of the Court an order was made and entered

granting a re-hearing, which order was entered as of the preceding term. The record contained no order showing the continuance of the motion and the petition for the re-hearing from the preceding term until the succeeding term.

The Supreme Court held there that—

> "The presumption must be indulged in support of the action of the Court having jurisdiction of the subject-matter and of the parties—nothing to the contrary affirmatively appearing, that the facts existed which justified its action; and therefore that the Court granted the application for a re-hearing at the term at which the first decree was rendered."

The Court further saying:

> "Besides the exception taken by the defendant to the proceedings of June 30, 1885 (the subsequent term), was not in terms that the order then formally made was directed to be entered as of October 31, 1884 (the preceding term), but that it granted a re-hearing. If they intended to deny that the re-hearing had in fact been ordered at the previous term of the Court, the point should have been distinctly made upon the record."

Paraphrasing the language of the Supreme Court in the case of *Fowler* vs. *Equitable Company, supra,* if appellants had intended to deny the power of the

Court to try the case without a jury "the point should have been distinctly made upon the *record.*"

Nelson vs. *Meehan,* 155 Fed., 1-5.

"Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment."

Canadian, etc. Co. vs. *Clarita, etc. Co.,* 140 Cal., 674.

"If the record is silent with respect to any fact which must have been established before the court to have rightfully acted, it will be presumed that such fact was properly brought to its knowledge."

Settlemier vs. *Sullivan,* 97 U. S., 444.

We submit that the jurisdiction of the lower Court upon this point should be maintained, especially so in view of the provisions of Sec. 475 of the Alaskan Code, viz:

"Any person in possession, by himself or his tenant, of real property, may maintain an action of an *equitable nature* against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

a provision distinctly different from Sec. 738 of the Code of Civil Procedure of the State of California

construed in the cases relied upon by appellants in that the Alaskan Code states the character of the action which may be maintained.

Respectfully submitted.

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